A VIEW OF THE CIVILE AND Ecclesiasticall LAW:

And wherein the Practice of them is *streitned and may be relieved within this Land.*

Written by

Sr THOMAS RIDLEY Knight, and *Doctor of the Civile Law.*

The Fourth Edition, with the Notes of *J. Gregory* late Mr of Arts, of *Chr. Ch. Ox.*

OXFORD,
Printed by *H. Hall* for *Ric. Davis.* 1675.

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Rare Book Rm

TO THE HIGH AND MIGHTY

PRINCE

JAMES,

By the Grace of God, King of Great *Britain France and Ireland, Defender of the Faith &c.*

MOST gratious Soveraign, since it hath pleased Your Majestie of Your Princely care towards the Church and Your Common-wealth, to take knowledge of some differences that are in Judicature between Your Ecclesiasticall and Civile Law, and the Temporall Law of this Land (by which

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joyntly Your Majesties State is managed next after Your own most rare providence, and the wisdome of such, whom it hath pleased Your Highness to associate unto Your selfe in the great affaires of Your Kingdome) I have been bold to offer unto Your Majestie this simple Treatise, as that which doth lay out the cause of those Differences, more particularly than any man hitherto hath expressed the same: In coming to which (because I doe speake for those parts of Your Majesties Lawes, which are lesse knowne unto Your people, and esteemed no otherwise of them, than they see the practice thereof to bee here within Your Land) I have thought good, as it were in a Briefe, to set out the whole summe of both the Lawes, to the view of the people, that they may see, there is more worth in those for whom I speak, than was by many conceived to bee: So that the profession of the Ecclesiastical and Civile Law may appeare to the world, neither to bee idle nor unfit for the State; so farre as it hath pleased the Royall Predecessours of Your Highnesse

to give entertainment unto it, and Your Majestie Your selfe to admit of it. In all which there is no other thing sought, than that such grievances as have been of late offered by one Jurisdiction unto the other, and in consequence, to all Your Subjects, who follow any suits in the Civile or Ecclesiasticall Courts, may by Your Princely wisdome be considered, and by Your authoritie be redressed, if they be found to be grievances indeed: for now as things are, neither Jurisdiction knowes their owne bounds, but one snatcheth from the other, in manner, as in a battable ground lying betweene two Kingdomes; but so, that the weaker ever goeth to the worse, and that which is mightier prevailes against the other: the professors thereof being rather willing to give Lawes and interpretations to other, than to take or admit of any against themselves. For which, the weaker appeales unto your Highnesse, humbly desiring Your Majesties upright and sincere Judgment to discerne where the wrong is, and to redresse it accordingly, which is a worke worthy Your

Majesties high consideration. For as the Land is Yours, so also the Sea is Yours, and the Church is under Your Highnesse protection, as a Childe is under his Tutor; so that all the Lawes thereof apperraine unto Your Majesties care and comfort alike. For which, not onely the whole profession of Your Ecclesiasticall and Civile Lawyers that now are, but those which shall succeed in those places for ever hereafter unto the worlds end, will praise and magnifie Your Majesties gratious favour towards them, and wee that now are, will pray to God for the long and happie prosperitie of Your Highnes, and Your Posteritie over us, during the continuance of this Heaven and this Earth, and after the passing away thereof, a perpetuall fruition of the new Heaven and the new Earth, wherein righteousnesse onely shall dwell for ever.

Your Majesties most humble

and dutifull Subject

THOMAS RIDLEY

TO THE READER.

GEntle Reader, I confeſs, as I mediꝰtated this Treatiſe upon mine owne motion (as I doe ſomtimes matters of other argument, when my leaſure ſerves mee thereto) ſo alſo I doe not ſet it out to the view of the world upon mine owne motion, but was deſirous it ſhould have been kept in, ſaving that I muſt obey where I am bound. The thing that gave mee cauſe to this meditation, was that I ſaw many times how meanly men eſteemed of the Civile and Eccleſiaſticall Law of this Land, valuing them by the practice of ſo much of them, as we have among us. And therefore I thought good, although not wholly to unfold the riches of them, yet to make ſhew of them folded up, in ſuch ſort as Mercers make ſhew of their ſilks and velvets, laid up in whole peices in their ſhops; whereby it may bee ſeen, what great variety they have of all theſe kind of wares, although the goodneſs

of this work it self cannot be discerned. In regard it is published. Besides, seeing how frequent prohibitions are in these dayes in causes of either cognisance more than have been in former time, I thought it not unworthy my labour to inquire and see upon what just grounds they are raised up in this multitude; not of any humour I have, to gainsay the lawfull proceedings of my Court (which I reverence and most readily acknowledge their authoritie in all things belonging to their place) but to know and search out the truth of those suggestions that give cause unto these prohibitions. For when as such Lawes as are written of these businesses, are written indifferently, as well for the one Jurisdiction as the other, no man is to be offended if the one Jurisdiction, finding it self pressed by the partiall interpretation (as it supposeth) of the other, inquire the ground of such interpretation, and labour to redress it if it may be, by the right interpretation thereof: To the end, that either Jurisdiction may retain their own right, and not the one bee overtopt by the other, as it seemeth to be at this day: And that in such matters (as they conceive) of their own right, as depend

of

of no other authoritie but of the Prince alone: which is the thing onely that is sought in this little Treatise. And therefore the Reverend Judges of this Land are to be intreated, that they will vouchsafe an equall interpretation of these matters, as well to the one Jurisdiction as the other, for so it is comely for them to doe; and if they do it not, the other are not so dull-sensed, but they can perceive it, nor so daunted, but that they can flie for succour unto him, to whose high place and wisdome, the deciding of these differences doth of right appertain. PENELOPE *is said to have had many woers comely in person and eloquent in speech, but shee respected none but her own* ULYSSES: *Such should be the mind of a Judge, that whatsoever other appearance or shew of truth be offered, one saying, This is the true sense of the Law, and an other that; yet the Judge should respect none but the very true germane and genuine sense thereof indeed. Which if it were religiously or indifferently observed in every Court, then needed not this complaint that now is, but every Jurisdiction should peaceably hold his own right, such as the Prince, Law, or Custome hath afforded unto it.*

Thomas Ridley.

TO THE READER.

THIS Learned and usefull View of both Laws, once more adventureth it selfe upon the Opinion of Men, and it may now hope to receive a more indifferent censure than before, as being committed to a season more mature, and more perfectly dispos'd; for howsoever the Time that first brought this forth, could not be charged with any notable distemper; yet the Common-wealth we live in is of that thriving nature, that however the present time may still bee good, yet it alwayes makes the succeeding Age better than it selfe. This argues the State not neare her ruine, though some unruly Spirits, led by an irregular Motion, have been bold to anticipate; as if every one that had so much pitty as to feare, had also judgment enough to foresee the ruine of a Kingdome. 'Twas more than enough for such Men to set downe the Fate of a single soule, without resolving upon the doome of a whole Nation. But those that would seeme to know such high things, are most properly punished by being neglected: for to a Man that would bee thought to know, and knoweth not, no greater misirie can happen, than that hee should faile of his Expectation. If I were to serve or follow any time, I would propose the Present, which as it hath leffe of the pretences of former Ages, so it hath

hath much more of the Moderation: and if it needs must be ſuſpected that the State is not farre from her fall, let this be the onely reaſon becauſe ſhe draweth ſooner to her perfection. That which heretofore moſt of all incumbred theſe Dominions, was the diſproportion of the Civil Power to the Eccleſiaſticall. This a Great Prince abated, and the Act was truly maſculine, yet like thoſe of the ſtrongeſt importance, would not be perfected by the ſame hand; therefore it was by him ſo fully done, on the one ſide, that it might be feared leſt it ſhould runne over on the other. To prevent this, the diſcretion of theſe late diſcerning times hath warily provided; the wiſdome of the Prince having ſo well tempered both the Powers, that it may now be hoped, they ſhall agree one with another as both doe in him, by a glorious correſpondence. The State thus bending towards the beſt, and the moſt perfect mediocrity, this Author, whoſe hope that always was, could not but revive again; therefore it is, that though hee be dead, he yet ſpeaketh. If ſtill there be that will reprehend theſe our paines, as if they were caſt upon a man too much ſought after, be it ſo; but theſe men have leaſt cauſe to complaine, for if the matter of this Book be, as they ſuppoſe, then the onely way to ſuppreſſe it will be to make it common, for things of that nature are leaſt of all enquired for, when they are moſt eaſily to be found; but if they rarely appeare, they are more eagerly ſought after, and the more obſtinately eſteem'd.

When firſt I would ſee this Treatiſe, I beheld it at a diſtance, and not without ſome prejudice, for ſo I was prompted by the inſinuations of a fallible Report; but finding

finding it under the Protection of the High and Mighty Prince James, I took liberty to refolve against all popular contradiction. And now, to feeke any other Patron for this new Edition, I have thought it altogether inglorious. For what can the man doe that cometh after the King?

For a Note or two, which I have here and there timerously let fall, If the Reader expect that I should aske his pardon, there may bee cause, but there is no convenience: for this kind of Complement is now adayes indifferently fet before thofe things that are well, and thofe that are ill done. Befides, it would argue Certaine follie, to be engaged there for pardon, where our choyce is to offend. What I have here done amiffe, I fhall hereafter hope to rectifie, either by doing fomething that fhall be better (if that may be) or (which is the fafeft way) by doing fo no more.

J. G.

A VIEW

A VIEW OF THE CIVILL AND Ecclesiasticall Law: also wherein it is straightned, and wherein it may be Relieved.

PART. I.

CHAP. I.

SECT. I.

The Division of the whole Book into foure parts.
What right or Law is in generall.
What is the Law publick, and what the Law private.
What is the Law of Nature.
What is the Law of Nations.
What is the Law Civile.

BEfore I shew how necessary it is for his Majesty and the Realm, to maintain the Civill and Ecclesiasticall Lawes, as they are now practised among us in this Realm, I will set down, as it were, in a breife, what the Civill, and the Ecclesiasticall Lawes are:

are: then will I shew how far forth they are here in use and practise among us; thirdly wherein wee are abridged and put beside the use and possession thereof, by the Common Law, even contrary to the old practise thereof, and the true sense and meaning of the Lawes of this Realm, and the Statutes in this behalf provided: and lastly, wherein we might be relieved and admitted to the practise of many things in the Civile Law, without prejudice to the Common Law; and so both the Lawes might know their own grounds and proper subjects, and not one to be jumbled with the other, as it is at this day, to the great vexation of the Subject. But before I speake of the Civile Law in particular, I will define what *Right*, or *Law* is, in generall: *Law* therefore *is* (as *Vlpian* saith, *L.* 10 *in fin. ff de Justitia & Jure*) *the knowledge of Civile and humane things. The understanding of those things which are just and unjust.* This Law is primarily divided into the *Law publick*, and the *Law private*. The *publick*, is that which appertaineth to the generall state of the Common-wealth, for I mean the Law publick, not in respect of the Forme, that they were publickly made, as we make lawes in our Parliaments (for so all the Civile Law is publick, as made by publick authority,) but in respect of the object, or end thereof, for that they concerne the Church, the Clergie, the Magistrate, and other like publick functions, none of which levell at the rule of equity, or equality between man and man, as private lawes doe, but ayme at that which is most fit, in generall, for the common State.

What law is.

1. *Jus publicum.*

The

The *private Law*, or the private mens Law, is that which concernes every singular mans state; which, for that it is occupied in giving every man his own, it must of necessity be proportionable to the rule of Equitie and Justice. 2. *Jus privatum.*

Private Law is of three sorts, the *law of Nature*, the *law of Nations*, and the *law Civile*.

The *law of Nature, is that which Nature hath taught every living creature*, as the care and defence of every creatures life, desire of libertie, the conjunction of male and female for procreation sake. The Law of Nature.

The *law of Nations*, *is that which common reason hath established among men, and is observed alike in all Nations*, as distinctions of mens rights, buildings of houses, erecting of Cities, societie of life, judgements of controversies, war, peace, captivity, contracts, obligations, succession, and the like. The Law of Nations

The law Civile, being largely taken, is the law that every particular Nation frameth to it self, as the *Athenian* lawes, and the lawes of *Lacedæmon*, in which sense also, the law of *England* may be called the Civile law, for that it is the proper and private law of this Nation: but in more strict sort, the *Civile law is the law, which the old Romans used*, and is for the great wisdom and equitie thereof, at this day, as it were, the common law of all well governed Nations, a very few onely excepted. 3. *Jus Civile.*

And certainly, albeit sundry other Nations by the light of Nature, have many Rules and Maximes in the Civile law: yet, if all the constitutions, customes, and lawes, of all other people and countries were

put

put together (I except none, save the lawes of the *Hebrews*, which came immediatly from God) they are not comparable to the law of the *Romans*, neither in Wisdome nor Equitie, neither in gravitie nor in sufficiency. Whereupon it is, that most of other Nations, (saving our own) although they receive not the Civile law wholely for their law, yet they so much admire the equitie thereof, that they interpret their own lawes thereby. *Pachius de regul. juris. Reg. Quæ è jure communi. regul.* 28.

CAP. I. SECT. II.

That there be foure Tomes of the Civile Law, The Digest, the Code, the Authentick and the Feuds. The Institutes are an Epitome of the Digest. What is the Digest, and why it is so called, and why the same are called the Pandects. What are the Institutes, and why they are so called.

THE whole Civile law it selfe, is reduced or brought into 4. *Tomes*, whereof the first containeth the *Digest* or *Pandects*, taken out of 27. old reverent Lawyers works, whereof sundry were before the coming of Christ, others flourished in the Emperours dayes, even unto the time of *Maximinus*, as it appeareth by *Spartianus* and *Lampridius*, in the life of the said Emperour: which said Tome is divided into 50. bookes, of which, every one containeth sundry rules of great Wisdome and variety.

Digests what.

To

To this Tome, I adde the Inſtitutions, which are a brief of all the former bookes, compoſed of purpoſe by the Emperour in the behalf of young learners, that thereby having the whole Digeſt drawn into a *Compendium* of 4. bookes only, they might with more alacrity, goe forward in the ſtudy of the law: having, as it were, the firſt Elements of the whole profeſſion in this little Treatiſe, whereas otherwiſe without the help hereof, their weak minds might be clogged with the multitude and varietie thereof, and ſo either altogether leave their ſtudies, or with more labour and diffidence (which oftentimes diſcourageth young mens minds in a long matter) come to the end thereof, to which, by the direction of this brief, they might ſooner attain, and that without much travell or diſtruſt.

Why ſo called.

The *Digeſts* have their name, of that they *are put into a comely order* by the Author, ranging every book and title into his Proper place, ſuch as either the courſe of Nature affords them, or are fitteſt for the practice of the profeſſion.

The Pandects.

The ſame booke again, is called *Pandectæ*, of the Greek words πᾶν & δέχομαι for that it compriſeth in it ſelf, all whatſoever *Juſtinian* drew out of 150000. verſes of the old bookes of the law.

The Inſtitutes.

The Inſtitutes are ſo called, becauſe they are, as it were, maſters and inſtructors, to the ignorant, and ſhew an eaſie way to the obteining of the knowledge of the Law.

The matters wherein the whole *law is occupied* are either the *perſons* in the common-wealth, or the *things* belonging or not belonging to them, or

the *actions* whereby men doe claim in judgment, such things as are due unto them by law.

SECT. III.

The Pandects, or Digest are divided into seven parts, and they againe into fiftie Bookes,
That the first thereof conteineth foure Bookes, and what is the summe thereof.

VPon a more particular division, the whole *Digest* is divided into *seven parts*: whereof the *first part*, standing upon *foure bookes*, containeth the principles, and as it were, the first elements of the Law; as, *what Justice* and *Right* is, from whence the Civile Law hath his begining, what *persons* be the *object* of the Civile law, what *Magistrates* the common-wealth of the *Romans* had, by whom either the lawes were made, or executed: the divers kindes of *Jurisdictions*, which those Magistrates used; *Meer*, *Mixt*, or *Simple*, according to their place: the *corrections* which the law used against such as disobey the Judge, either in not appearing, or not *performing* that which is injoyned them: what provision it made against such, as by violence *rescued* men out of the Judges hands: what Holydayes there were, wherein the Courts were not held: what order the Law took against the *plaintife*, that having *cited* the *defendant*, had no *Libell* ready to put into the Court, unlesse happyly otherwise the parties upon private agreement compounded the matter between them: who were to be admitted advocates

advocates, and what cauſes barr'd them from the office: what is the office of a *Procurator*, *Sollicitor*, or *Syndict*, or *Factor*; and under what cautions they were admitted, if they had no *Proxie*, or *Mandat*, or the partie principall did not in preſence authoriſe them: how they were *puniſhed*, who upon reward took upon them to vexe men unjuſtly in the Law, in manner as common *Barators* doe: what *perſons* having loſt opportunitie to *alleage* any thing for themſelves *beneficiall* in Law, may be *reſtored* thereunto againe; as *Minors*, and ſuch other, as by *feare* or *craft* of the adverſarie have been driven away from their lawfull defence: how perſons of common truſt, as *Marriners*, *Inholders*, and ſuch like, are bound by Law to *reſtore* ſuch things as they have taken in *charge* to keep.

SECT. IV.

That the ſecond part hath ſeven bookes and what are the Contents thereof.

THE *ſecond part*, being diſtributed into *ſeven bookes*, yieldeth matter of *Judgement*, as who may be *Judge*, and who not: where and before what Judge every one is to be convented: how many kindes of *Judgements* there are, *Civile*, *Criminall*, and *mixt* of both: by what *actions things* that are ours by right of inheritance may be challenged, whether they be *corporall* or *incorporall*: what *action* the Law affords, if any man *conceale* that is ours, that wee may come to the ſight there-

of: what *action* lyeth against him, who by evill *perſuaſions*, or lewd inticement hath *corrupted* another mans *ſervant*, or having run away by his ill counſel, hath concealed him from his maſter: what proviſion the Law hath against *Dice-play*, and ſuch as keep *Dicing-houſes*: how he is to be *puniſhed*, which being put in truſt to *meaſure* any mans *ground*, makes a *falſe report* of the meaſure thereof: that no man *hinder* a corſe of a *dead body* to be carried to *buriall*, or to be buried in ſuch places, as hee and his *predeceſſours* have right unto, or to build a *Tomb* to that purpoſe, and beautifie the ſame.

SECT. V.

That the third part ſtretcheth it ſelf into nine books, and what they contein.

THE *third part*, imbracing *nine books*, concerneth *perſonall actions*, which riſe not of cauſe of right or poſſeſſion but of *covenant* and *obligation*; as things credited or lent in a certain ſumm; the means how to recover the ſame, if it be denied, *that is by oath of the partie that denieth it, unleſs he may be convicted, either by witneſs or inſtrument, that he hath forſworne himſelfe*: how many kinds of *oaths* there are, *voluntary* out of Judgement, *neceſſarie* exacted by the Judge in doubtfull caſes, where otherwiſe there wanteth proofe to manifeſt the trueth: *Judiciall*, ſuch as one partie offereth to another in Judgement, and cannot be refuſed without juſt cauſe: and laſtly, that which the Judge offereth

to

to the plaintife, as concerning the value of the thing which is in ſtriſe, or the charges that he hath been at in recovering of the ſame: what exceptions there lyes againſt Obligations, as that which for cauſe was given, and the cauſe did not follow: that the cauſe was diſhoneſt, for which that is challenged that was given; that the ſumme was not due which was paid, and therefore not to be exacted, but to be repaid: *actions for things lent* for a certain time, and to a certain uſe: actions for things *pawned*: actions that either paſſengers have *againſt Marriners* for the goods or ware that they have brought into the ſhip, or Marriners have *againſt Paſſengers* for their fraught: actions of *ejectment*, wherein the paſſengers and Marriners are bound each to other for contribution of the loſſes of ſuch things that have been caſt into the ſea, in the time of a ſtorm or tempeſt, according to the qualitie or quantitie of the goods they have in the ſhip: actions whereby maſters are bound to anſwer for their *ſervants contracts*, and fathers for their children, in ſuch things, or negotiation, as they have put them in truſt withall, ſaving where the childe borrowed money without his fathers privitie for riot, and for ſuch purpoſe as his father hath no uſe thereof: *Remedies* for *women* when by weakneſſe of their ſexes, and lack of counſell, they have inwrapt themſelves in ſuretiſhip for other men, action of *compenſation*, where a debt is demanded, for which an equivalent portion hath beene received in lieu or ſatisfaction thereof, actions of *mandate*, or commandement, wherein one hath done ſome work or

laid out some money upon an other mans mandate or word, and yet when he requireth allowance thereof, it is denied him: actions of *societie* or fellowship, wherein either the societie is required to be maintained, or the money put in common banck to be divided: actions of *bargain* and *sale*, either *pure* or *conditionall*, the bargain being once made, the loss and gain that after happeneth is the buyers, unlesse the seller retain some further right in the thing sold unto himselfe: actions of *letting* or setting either of the use of a person, or the use of a thing upon a certain *hyer*: actions of *change* and such like.

SECT. VI.

That the fourth part conteineth eight bookes, and the contents thereof.

THE *fourth part* being digested into *eight bookes* ministreth *actions* for such things as are accessarie to contracts, such as *pawnes* and *pledges* are, which are given for the better securitie of the contract: actions for *restitution* wherein a man hath been deceived in a bargain, more than the halfe value of the thing sold, or wherein the seller hath concealed some fault in the thing sold, which he ought by Law to have revealed, or promised some qualitie in the same, which was not in it, or where the thing sold, hath been evicted by an other, out of the hands of the buyer, himselfe using all just defence of Law for himself: actions

for

for *intereſt* and *uſurie*, and how many kinds thereof there be that men uſe by land, *Lucratory*, *Compenſatorie*, and *Punitorie*; whereof the firſt is altogether unlawfull, the other two allowed where either juſt gain ceaſeth, or juſt loſſe followeth, upon the occaſion, that, that which is lent is not payd according to the day of covenant. *Sea-uſurie*, otherwiſe called *nautick uſurie*, is greater than land uſurie, and yet *allowed* by Law, for that the ſeafaring man takes upon himſelfe the danger of the tranſporting thereof, and ſecuring the ſame at ſuch place as it is appointed to be delivered. In *deciding* of matters of *controverſie*, the Law proceeds ſometimes by *witneſſes*, ſometimes by *inſtruments*, ſometimes by *preſumptions*, where knowledge or ignorance of fact, or Law is preſumed. *Spouſals* are *mutuall promiſes of a future marriage*; *marriage is a lawfull coupling together of man and woman*, the company and ſocietie of the whole life, the Communion of all Divine and human rites and things and of one and the ſame houſe, wrought by the conſent and mutuall good will of the one towards the other: in eſpouſals and marriages is to be conſidered, who is to be joyned together, at what years, and by whoſe conſent: there doth wait and attend upon Marriages, *Jointures*, *Dowries*, and ſuch like, and ſometimes *Divorce*, which is ſo called of the diverſitie of the mindes of thoſe that are married; becauſe, ſuch as are divorced, goe one a divers way from the other. The cauſes whereupon Divorces grow, are Adultery, deadly hatred one toward an other, intolerable cruelty, neerneſſe of kinred and affinitie

Divorce what, and why ſo called.

The cauſes of Divorces.

affinitie in degrees forbidden, impotencie on the one side or the other: actions of Dowrie after divorce or separation, actions against a mans wife imbeasselling away his goods; actions against a husband disclayming his owne childe; and his wife being with childe, if he make doubt thereof, means how and where she shall be kept untill her delivery, so that no false birth shall be put in place of the true childe; or that she abuse not her husband or the next heire, with a false shew of that which is not. *Tutelage* and government of children under age, which is either *testamentarie*, or due to the *next of kinne*, or *dative*, all which are either to be confirmed or disposed of by the Magistrate. Administrations of Tutors and Curators, and how farre they are endangered by their office, and wherein they are to interpose their authoritie and consent, and for what acts the pupils or minors may be sued, done by the tutors or curators; how any may be argued to be a suspected tutor or curator; and how, and by whom he may be removed, if there appear just cause of suspition against him. A *tuter* is chiefly set over the *person* of the childe, secondly over his goods: but the *Curator* or Guardian is chiefly set over the *goods*, and then over the person of the child. A childe (his father being dead) by the order of the Judge, is to be brought up with his mother, unless she had fled unto a second marriage, which if shee have done, then is he to be brought up with some of his neerest kinne, such as is knowne to be an honest man, and will have a care of his good education; with whom the Judge is to allow him such maintenance,

maintenance, as all his ſtock be not ſpent therein, but ever more ſomthing be left againſt he come to full age. when the time of tutelage, or curatorſhip is ended, they are to render account unto the Judg, what they have received; and how they have expended the ſame, and what reſidue is left, and according as their prooſes are, either by oath, or otherwiſe, ſo the Judge either alloweth, or diſalloweth the ſame. If the Tutors or Curators prove bankrupt, or unable to ſatisfie the Pupill or Minor, then lyeth an action againſt their ſuerties for the ſatisfaction of the ſame; and if both of them faile, then lyeth it againſt the Judge, or Magiſtrate, if either he have not received any caution at all of the Tutors or Curators, or hath received an unſufficient caution, or unſufficient ſuerties, knowing them to be unſufficient; otherwiſe he is not to ſecure fortune, and future caſes of the child: the Tutors or Curators are to ſell nothing of thoſe things that are the childrens, ſaving ſuch things which by keeping cannot be kept, unleſs they have the order or decree of the Judge thereunto, which the Judge is not to decree, unleſs the childe be ſo farre in debt, that it cannot be ſatisfied, without ſome part of the other goods, or there be ſome other like juſt and neceſſarie cauſe like unto this, which may not be avoided. As *Minors* have Curators and Governors, ſo alſo *mad perſons*, and *prodigall* perſons are appointed to have governors by law, for that they can no more governe their owne ſtate, than the others can. Prodigall perſons are they that know no time nor end of

ſpending,

ſpending, but ryot or laviſh out their goods without all diſcretion.

SECT. VII.

That the fifth part comprehendeth nine bookes, and the matter thereof.

UNder the *fifth Section*, which compriſeth in it *nine bookes*, are conteined *laſt wils* and *Teſtaments*, and who they be that can make the ſame: and how many kinds thereof there be, *Solemne* or *Militarie*, and they either put in *writing*, or elſe *Nuncupative*. what is an unjuſt, or Void will: what is to be thought of thoſe things, which, are found either to be blotted out, or interlined in a Will: how Heires or Executors are to be inſtituted, or ſubſtituted in Wils, and under what conditions they may be either inſtituted or ſubſtituted in the ſame: what time an heir hath to deliberate after the Teſtators death, before he prove the Will: what priviledges it hath: how the inheritance may be either got or loſt: how Teſtaments are to be opened, publiſhed, and writ out: what mens Teſtaments are to be opened and publiſhed: of the puniſhment of ſuch, which, a Will being extant, ſeeke by Adminiſtration, or ſome other like means to poſſeſſe the goods: and of thoſe which either forbid, or compell any man to make a Will: of the power or right of *Codicils*: of *Legacies*, and bequeſts: as what

what things may be bequeathed, and what not; to whom any thing may be bequeathed, and of the ſignification of the words, and things which doe appertain unto Legacies: of yearly and monethly Legacies, what time they be due: in the beginning of the year, or in the end: which of them be pure, and which conditionall: of any thing bequeathed: of dwelling, and workes of ſervants bequeathed, of Dowry bequeathed, and what profit the Legatorie hath thereby, of choiſe or election bequeathed, of wheat, wine, and oyle bequeathed, and what is contained under every of them: of ground furniſhed bequeathed, and the inſtruments thereto belonging, and what is to be underſtood by that bequeſt: of ſtore bequeathed, in Latin called *Penus*; what is compriſed under that word: of houſhold-ſtuffe bequeathed: of education, and bringing up bequeathed: of gold, ſilver, womens attire, ornaments, and ſuch like bequeathed, and what is to be underſtood by every of them: how Legacies may be taken away: of things that are doubtfull in a Will, and how they are to be underſtood: of thoſe things that are left for puniſhment ſake in a Will, whether they be available, or otherwiſe: of thoſe things which being bequeathed in a Will, are counted not withſtanding as not bequeathed, of thoſe things that are taken away from the Legatories in the Will, as unworthy of them: of conditions, demonſtrations, and cauſes, what force they have, and how they prevaile in a Will. Of the Law *Falcidia*, what it is, and how men thereby are reſtrained from bequeathing any more than three

three parts of their goods, ſo that a fourth part thereof ſhould ſtill remain with the heire; and if any man had received in Legacie more than he might by the law *Falcidia*, that hee ſhould put in bond to reſtore that, if any unknown debt after ſhould appear, ſo the ſame were true debt; at what day a Legacie becomes due; that is ſtreight from the death of the Teſtator, unleſſe it be left to be paid upon a certain or uncertain day, or under a condition; and that the heire enter into bond to pay the legacie when the day comes, or the condition happen; and if he refuſe to doe it, then the legatorie to be put in poſſeſſion thereof untill the day or condition happen.

SECT. VIII.

That the ſixt part is ſpent in ſeven books and the ſubject thereof.

THE *ſixt part* ſpreading it ſelfe over *ſeven Bookes* handleth matters of *poſſeſſion* of goods, or *Adminiſtration* thereof, not growing out of the Civile Law (which onely makes heires, and giveth right of ſucceſſion) but out of the Pretorian law, or law of conſcience, which in equity calleth ſundry to the ſucceſſion of other mens goods by adminiſtration, where there is no Will, and in ſome caſes where there is a Will, as where the Will is concealed, or the Executor renounceth the Will, but if the Will once appear, then the adminiſtration forthwith ceaſeth. In caſes where Adminiſtrations

Of Adminiſtration.

ons are to be granted, the children of the deceaſed have liberty to take it, within a year after the death of the deceaſed, and if they be further off of kin, then they have only a hundred dayes to take it in, unleſſe thoſe which are to take it are infants, mad, deaf, dumbe, or blind, in which caſes there is a longer time aſſigned. The Pretor granted adminiſtration not only according to the tables of the Teſtament, but many times even againſt the tables of the Teſtament: as where a child is not diſinherited in his Fathers will by plain terms, but paſſed over with ſilence only, as not remembred; or that the child was not born at the time of his death, and ſo not known whether any ſuch child were living, or to be hoped for, or not: In which caſe, if it do after appear, the Mother is put in poſſeſſion of that which is the childes part. If there appear no will, the *Adminiſtration is committed* in this order; Firſt, the *children* of the deceaſed are admitted: Secondly, thoſe that are *next of kin in the Male line*: Thirdly, thoſe that are next of kin in the *Female* line, (which difference notwithſtanding betweene male and Female at this day is taken away, and they that are next of kin are equally admitted in either ſex) Laſtly, comes thoſe which have right thereto, either in that they are man or wife. The Law ſundry times, where a thing is done, or intended to be done, againſt an other mans right, and there is no proviſion for it in Law, yielded the party grieved an Interdict or Injunction to hinder that which was intended to his prejudice, As whereone buildeth an houſe contrary to the uſuall and received forme of

building,

building, to the injurie of his neighbour there lyeth an Injunction *de novi operis nunciatione*, which being once ſerved, the offender is either to deſiſt from his worke, or to put in ſureties, hee ſhall pull it downe again, if hee do not within a very ſhort time avow the lawfullneſs thereof. Again, there lyeth an Injunction where hurt is not yet done, but feared to be done; as where a houſe is ruinous, or the eves, or any outcaſt worke thereof hangeth dangerouſly over the way, ſo that it is doubted it will fall and hurt ſome that paſs by, the owner or Lord thereof is to put in ſuertie to the Magiſtrate, that if any be hurt, or miſcarie thereby he ſhall anſwer for it. If any cauſe the water of the river, or rain-water to run an other courſe than before time it was wont to do, and that the neighbours are like to be prejudiced thereby, the Law yieldeth an Injunction, either to ſtay the worke that is intended, or to ſecure the neighbours for the hurt that is like to follow thereupon. If *Cuſtomers*, *Collectors*, or *Tolle-gatherers exact* more ſubſidie, or other like publick duties, than by Law they ought, or diſtrain any mans goods, upon pretence thereof, or ſtay in their hands ſuch duties as they have received whereby the partie that hath paid it, falleth into any forfeiture, or that they repair not the publick high ways, in which reſpect ſubſidies, tributes, and other ſuch like duties are given to Princes, they are to be *puniſhed* in the *double value* of that which they have received, and otherwiſe to be fined for their ill dealing in that behalfe. In gifts which are purely given, or under a day, or condition, and ſpecially

in

in thoſe that are given in contemplation of death, which are compared to Legacies themſelves, a right paſſeth without deliverance, and giveth ſufficient matter of challenge unto him, to whom they are given. The means or wayes whereby the Lordſhip or *right* of any *thing* is gotten, be it *naturall*, as by the firſt occupying the ſame, by finding the ſame, by bringing it into a forme or faſhion, by gaining by the ſea or river, by delivery, or ſuch like: or, be it by *civill means*, as by getting the poſſeſſion of any thing by good title, and good faith, ſo long as it will make a juſt uſurpation, or preſcription, by holding it as heir, by holding it by a gift, by taking it up as a thing forſaken, by holding it by legacie, dowry, or inheritance, by coming to it by ſentence definitive, or interlocutory, by confeſſion of the adverſary, by ceſſion of the partie, by auctority of the Judge, and the ſame have bin fraudulently alienated by the debtors, there lieth an *Injunction* to put the partie *injured* into *Poſſeſſion*. All Injunctions for the moſt part are prohibitorie, and ſerve either to get, or to recover poſſeſſion, and are called commonly by the firſt name of the writ, as where one is denied the poſſeſſion of inheritance belonging to him, an Injunction is granted him, to put him in poſſeſſion, called *Quorum bonorum*; or if it be for a legacie, *Quod legatorum*; and if it be in generall caſes, *Ne vis fiat ei qui in poſſeſſionem miſſus eſt*: That he that hath gotten the cuſtody of the Will exhibite it: that no private building, or ſuch like, be ſet up in a holy and ſanctified place, and if it be, that it be pull'd down again: that no Nuſance be done in publick places,

or

or high wayes, other than such as by the Law are allowable: that publick high wayes be repaired: that nothing be done in any river, or the bankes thereof, whereby Ships or Barkes may not passe thereon: that no thing be done in any common stream, whereby the water should be forced to run otherwise this year, than it did the last summer afore: that it may be lawfull for every man to saile or rowe in any publick stream: that the bankes of the river be repaired. Of *force*, and *force armed*, where two are in possession of one thing, and neither of them came by the same by force, or by secret slight, or by sufferance of an other, there lyeth an Injunction for continuance of their possession, called *uti possidetis*: That a man may use such private way, as he hath used the year past, and repaire the same without interruption of an other: That no man turn away the daily running water, or the water which sals in Summer from an other mans house, or ground to his hinderance: That watercourses in rivers, and other like places be maintained: That such as have right to draw water out of any spring, or well, be not forbid the use thereof, and that every one have free liberty to cleanse, purge, and to repaire the same, if there be any decay in it: That no man be forbid to scoure, purge, or cleanse his privies, sinkes, or vaults: That whatsoever is done by open force, or secret subtilty, be restored where it was, before such force or subtilty was done, unlesse the partie grieved release the same: That he that holds any thing at an other mans will, restore the same upon competent warning, or

knowledge

knowledge given him thereof: That a man may lop or cut the boughes of an other mans tree, annoying his ground, if after warning given thereof, the owner thereof do not reforme it. That it be lawfull for a man to gather ſuch fruits of his, as fall from his own tree into an other mans ground, without any treſpaſſe to the owner of the ground, ſo that he gather the ſame within three dayes after they are ſo falne; for otherwiſe the law preſumes he makes no reckoning of them, and fruits lying upon the ground do eaſily putrifie: That a man may challenge his children out of an other mans hands that holdeth them from him: That a Tenant after his leaſe is expired, may remove, and quietly carrie away ſuch things from the farme, as he brought thither, ſo that the Rent be paid, and thoſe things which hee brought thither, were not bound for the payment thereof. *Actions are taken away*, and poſſeſſions maintained by *exceptions*, *preſcriptions*, and *prejudices*, which themſelves are many times inſtead of actions, as is the exception *de re judicata*, which is an exception that determineth the cauſe in controverſie. Of *Exceptions*, ſome are *perpetuall* and *peremptory*, ſome are *temporall* and *dilatory*: perpetuall and peremptory are they which evermore have place, and can never be avoyded; Temporall and dilatory are they, which are not evermore in place, but may be avoyded: Exceptions are alleaged, either becauſe that is done which ought to be done, or that is done that ought not to be done, or that is not done that ought to be done. Of *Preſcriptions* likewiſe ſome are *perpetuall*, ſome *temporall*; the effect of either

Exceptions.

Preſcriptions.

either of them, is to determine the action, either in the *maner* of doeing, or by the *time* when it was done, or by the *place* where it was done, or by some other like *circumstance*.

Obligations. *An Obligation is a bond of the Law, whereby a man is necessarily bound to pay some thing to an other man*: Obligations arise either out of *bargains* betweene man and man, or out of some *offence* that is done: Obligations by bargains, are procured either by some thing that passeth betweene the parties that doe contract, or else is effected by words, or consent. Out of obligations spring actions, which are nothing else, but a right to prosecute that in judgment, which a man pretendeth to be due unto him, whereof there are two sorts; of which, one is a challenge for right of a thing due, the other, a suite against a person for some offence or trespasse done.

CAP. I. SECT. IX.

That the seventh part is divided into six bookes, and the matter thereof.

THE *seventh* and last *part* being divided into *six Bookes*, treateth of *Obligations*, which stand in *words*, and their effect: how far two or more principall debtors are bound to the creditor in the whole, or every one for his own part: Of *Suerties* and how farre they are bound, and whether the discharge of the one be the release of the other, and by how many wayes *Obligations* by words

words are *diſſolved* or releaſed, by *renovation*, by *acceptation* of the debt not paid, as if it were paid. Of Obligations ſome are *Civile*, as thoſe which have beene heretofore handled, ſome *Pretorian* or pertaining to the *Chancery*, as thoſe whereby Tutors, Curators, and Proctors, enter into bond unto a child, that his ſtate ſhall be ſafe, that is committed to their hands: That, that ſhall be paid which the Judge ceſſeth: That the Plaintiſe ſhall ratifie and allow that which his Proctor ſhall doe for him in judgement, and ſuch like. *Criminall Judgements* are *private* or *publick*, that is they are commenced either upon private offences, or upon publick faults and ſuits. Private offences concerne private mens revenge and injuries. Publick, the revenge or injurie of the whole ſtate. Private offences which had ordinary proceedings, and ordinary puniſhment, were many, among which *Theft* is the chiefeſt, which *is a deceitfull fingering of an other mans goods, with intent to gain either the thing it ſelfe, or the uſe or poſſeſſion thereof*; ſo that the mind alone maketh not theft, but the act joyned to the mind, be the quantity never ſo ſmall. Of *Thefts*, ſome are *manifeſt*, other not *manifeſt*; manifeſt is that, wherein the offender is taken in the deed doing, or taken before he could carrie away the thing ſtoln thither, whither he intended: the puniſhment whereof was four double the value of that which was ſtoln: Not manifeſt, was that wherein the party offending was not taken in the deed doing; and the pain thereof was the double of that which was purloyned, or taken away. If any pilfery or theft be done

Private offences.

in a Ship, Taverne, or Inne, the Master of the Ship, Taverne, or Inne, is to answer double the value thereof, if the same be done by himselfe, or their selves, or any of their marriners or servants: for it behoveth them to have honest men, whom they are to imploy in such services: But if it be done by any of the passengers, or guests of the house, the owners of the Ship, Taverne, or Inne, are not to answer for the same, for they cannot turne away such guests as come into their house; neither, in all likelihood know they the quality or condition of their guests. If any man privily, unwitting the owner thereof, cut downe, hack, or barke any tree of any sort whatsoever, or those that are of the nature of trees, as Ivie, Reedes, Willows, so that they be spoyled, hee is to answer the double value of that hee hath cut down and spoyled: and further, if it be a Vine-tree, to be punished as a robber. Hee that taketh any thing away from another by violence, is to be punished in the worth four fold, for that it is a sin more grievous than theft. If any man upon any ill intent, make a Tumult, whereby any hurt cometh to any man, he shall answer double of that the party is harmed in: If any, upon a burning of a house, or the fall thereof, or upon a shipwrack, or the spoyling of a boat or ship, steale any thing away, or being put in trust to keep any thing thereof, conceal the same, hee shall pay the four double of the same; but if any man set the same afire himself, he is either to be cast out to wilde beasts, or is to be burnt with the same fire he went about to burn an other with. If any have spitefully, contumeliously injured an o-

ther

ther man, his wife, or children, in deed, word, or writing, they are to forfeit ſo much as the partie grieved ſhall eſteem himſelf injured by, or the Judge ſhall taxe it at. *A famous Libel* is where a man hath of malitious purpoſe writ, compounded, or ſet out any thing to the infamie of an other, without a name, or with a name, and the puniſhment thereof is death, and anciently was, that he loſt the power or liberty to make a Will; the like puniſhment followeth him, that having found an infamous Libell, doth not by and by ſpoyle the ſame, that the knowledge thereof come not abroad, eſpecially where the matter thereof is capitall or worthy death. *Libel what.*

Extraordinary crimes, are thoſe *which have* no ordinary *puniſhment* appointed them, but are *arbitrarie* at the Judges appointment, ſuch as are Sollicitors of other folkes wedlockes, and Maides chaſtities, although they miſſe of their purpoſe, ſuch as of purpoſe caſt myre, durt, or any like filth upon another, to the intent to diſgrace him: ſuch as, being with childe, of purpoſe cauſe themſelves to miſcary: Such as keepe brothell and baudy-houſes, or other unlawfull company: Juglers, and ſuch as carry about Snakes, and other like Serpents and trumpery to put men in feare: Such as hide and oppreſſe Corne, to cauſe the price to be dearer: Such as either make, or uſe falſe weights wittingly; for all which, becauſe there is no proper puniſhment provided in the Law, they are referred to the puniſhment of the Judg, who is to puniſh them according to the quality of the fact, age, and underſtanding of the offender, and other circumſtances accord- *Extraordinary Crimes.*

ing as he shall think good, so, notwithstanding that he exceed not a convenient measure therein, neither stretch the same to death but upon some great and weighty cause, he is to be content with meaner punishment, as temporall banishment, whipping, or some moderate pecuniary mulct. For violating or defacing another mans sepulchre, Infamy was imposed, besides a pecuniary mulct to be divided between the Prince and the party grieved, but if any dig up the corse of the deceased, the punishment is death. If any, by feare of his office or authority, wring any money from any man, or exact more fees in any matter than he ought to doe, or cause him to marry, or doe any other thing he would not doe, the forfeiture is four double the value of that which hath been taken, beside further punishment at the discretion of the Judge. Such as drive mens cattell out of their ground, or sever them from the flock or herd, with intent to steal them, if they doe it with a weapon like unto a Robber, are condemned to be thrown to wild beasts, otherwise are more lightly punished according to the discretion of the Judge. Such as in Judgment take mony on both sides, or taking upon them the defence of one side, betray the cause, and take mony on the other side, are infamous by law, and are punished at the discretion of the Judge. Such as receive thieves, and other like malefactors, are punished in like sort as the thieves or malefactors themselves are; especially if they have assisted them in their wickednesse: otherwise, if they onely knew it, and received them, they are more mildly to be punished, especially if the offenders were their kinsmen: for, their

offence

offence is not like theirs, which entertain thoſe, which are no kin to them at all; when as it is naturall for every one to regard his own blood: and fathers are many times more carefull for their children, than for themſelves; but if that bee that received them knew nothing of the offence, then is he altogether to be excuſed. Such as break priſon, are to be puniſhed by death, becauſe it is a certain treaſon to break the Princes ward, but if they ſcape by the negligence of the Keepers, againſt whom the preſumption lyeth ever in this caſe, they are more lightly to be puniſhed. If any commit Burglarie, breaking up a doore or wall, with intent to doe a Robbery, if they be baſe companions, they are to be condemned to the Mynes or Gallies, but if they be of better reckoning, they are, to be put from the ranke or order wherein they are, or to be baniſhed for a ſeaſon. Juglers and like Impoſtors, which goe about deceiving of the people with falſe tricks and toyes, hookes and ſuch like, which inſinuate themſelves into other mens houſes, with purpoſe to ſteal, are puniſhed at the diſcretion of the Judge.

If any ſteal, or take away any thing out of the inheritance of another man, before either the Will be proved, or adminiſtration be taken, an action of theft lyeth not, becauſe the inheritance, during the time, was counted no bodies, but he is to be puniſhed by the diſcretion of the Judge; yea, though it were the heire himſelf that did it. Coſenage, whereby a man craftily ſuppreſſeth ſome thing he ſhould not, or putteth one thing in anothers place, to the deceit of him that hee dealeth withall, or corrupt-

eth such wares which hee uttereth, or doth any other thing collusorily, which is called of the Law *Crimen Stellionatus*. A of a little vermin or creature called *Stellio*, much like to a Lisard, most envious to man is censured by some ignominious and shamfull punishment, or by disgracing the person, by putting him out of the Office, Place, or Order he is in, or by injoyning him some servile worke, or by banishing him for a time, or by some like punishment, at the discretion of the Judge. If any plough up a Mere-balke, or remove any other marke which hath accustomed to be a Marke or bound between ground and grounds, which anciently was counted reverend and religious among men, the offence is punished either by a pecuniarie mulct, or by banishment, or whipping, at the discretion of the Judge. Unlawfull Colledges, Corporations, and assemblies, gathered together to bad uses, as to eating, drinking, wantonnesse, conspiracie, are punished as publick Routs or Riots, otherwise at the discretion of the Judge: All these, before recited, are called *Popular Actions*, because, not onely he that is injured, but every other honest subject may pursue and prosecute the same.

Crimen Stellionatus.

Publick Judgements are such, which immediatly pertain to the punishment of the common-wealth for example sake, and are examined, tried, and punished by a publick order appointed by law, the partie grieved, making himselfe partie to the suite, and following the same; the party accused in the mean while remaining in prison, or putting in suerties for his appearance, and the partie grieved for

Publick Judgements.

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the proſecuting of the ſame. The chiefeſt of which ſort is *Treaſon*, which is a diminiſhing or derogation of the Majeſtie of the people, or Prince, on whom the people have collated all their power, which is puniſhed with death, and confiſcation of the offender, and the eternall aboliſhment of his memorie. The next is *Adultery*, which is violating of an other mans bed, whoſe puniſhment anciently was death, both in the man and in the woman, but after it was mitigated in the woman, ſhee being firſt whipt, and then ſhut up in a Monaſterie; but by the Canons, other paines are inflicted. Under *Adultery* are contained *Inceſt*, *Sodomy*, *Baudery*, and all the reſt of the ſins of that kind. *Publick force*, is that which is done by a company of armed men collected together, and the correction thereof is perpetuall baniſhment. *Private*, which is done without Arms, the paine thereof is the loſſe of halfe the parties goods, and the infamie of his name. *Murtherers* and *Poyſoners*, *Witches* and *Sorcerers*, the crime being proved dye the death: ſuch as ſet mens houſes a fire, are to be conſumed with fire themſelves: ſuch as kill either Father or Mother: or thoſe that are in the place of Father or Mother, or any that are of next a kin, their puniſhment is death; and in caſe of the Father and Mother the pain of death, the *Parricidae* being firſt well *whipt*, ſo that the blood doe follow in good plenty, hee being *ſowed* up into a *ſack*, together with a *Dogge*, a *Cock*, and an *Ape*, is thrown into the depth of the Sea. Such as make falſe Certificates, forge falſe Wils, Depoſe falſe wittingly, ſuborne witneſſes, take money either to ſay, or not

to say their knowledge of that which they are demanded of in Judgement, corrupt Judgement, or cause it to be corrupted, interline, put in, or raze out any thing out of any writing, that the trueth thereof may not appear as it is written, suppresse Wils or Testaments, or other like writings, counterfeit other mens hands and Seals, open any mans Will yet living, and impart the secrets thereof to the parties adversarie, unseale such instruments or writings, as are left with him to keep; bequeath unto themselves Legacies in an other mans will without his good will and privitie; wash or clip gold, or sowder therein any corrupt mettals, make base silver money; pretend themselves to be Noble men or Gentlemen, whereas otherwise they are but base persons; wilfully challenge unto themselves an other mans name, or Arms; cog and foist in womens labours or otherwise, false births, or adulterous children, in steed of true and rightfull heires; sell one and the same thing to two men, carrie about false Pasports, use false Measures, or corrupt those that are true; in some cases, are punished by death, in other by banishment, imprisonment, or cutting off both or one of the hands of the offender. If any bearing any publick office, abuse the same to gain, and doth that for money, which he ought to doe for thankes, the Law ordereth, that the offender shall be called to account for his supposed bribery, and if hee be found guilty thereof, fineth him four fold to the party grieved, and beside, decreeth him to be banished. Such as by ill devises and policies, raise up the price of corne, and other victuall, or get

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the whole ſale of any merchandiſe into their hands, that they may ſell it the dearer, are puniſhable at the diſcretion of the Judge, which according to the quality of the perſon and fact, reacheth ſomtimes to baniſhment, ſometimes to death it ſelf. If any take, purloyne, or interver̄s to his own uſe any mony dedicated to holy and publick uſes, or cauſe the ſame to be taken, purloyned, or interverted, or if any take away any braſen table, wherein any publick Lawes are graven, or the bounds of any Lands are deſcribed, or blot out, or change any thing thereof, or covetouſly pay in leſſe money into the Exchequer, than by right he ought to have done, and hath not cleered with the Exchequer for the reſidue, is to be condemned in the three double of that which is the reſidue, and is beſide to be baniſhed.

If any, to get an Office, procure a number of hired voices, beſides the loſſe of the Office he ſueth for, his puniſhment is temporall baniſhment. If any ſteal away any child, the body of any free-man, and ſell the ſame away, or detein them againſt their will, the fault is death. If any ſlanderouſly charge an other with any falſe crime, or wittingly bear any falſe witneſs againſt him, or willingly give any wrong Sentence againſt him; or on the contrary ſide, diſſembleth ſuch faults as he knoweth, and colludeth with the adverſary, or giveth over the proſecution of a crime hee hath undertaken to follow, untill he have leave granted him by the Judge, to deſiſt from his accuſation, the ſame is to be puniſhed with the like kind of puniſhment, that hee would have the other puniſhed by, unleſs he be acquitted there-from by

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the Princes pardon, or that the Adverſarie be dead. In publick Judgements where the Offender appeares not, Proces is to be awarded out againſt him for his appearance, by a certain day to cleere himſelf; at which day if he appear not, an Inventory is taken of his goods, not to the intent they ſhould be ſpent, but that they ſhould be reſerved to his uſe, if hee returne again within a year, and cleer himſelf; otherwiſe they become the Exchequers for ever, how innocent ſoever the party afterwards appears to be. If the Offender be preſent in Judgement, and deny the fact, he is to be confuted by witneſſes, or other proofe; or if there be juſt matter of ſuſpition, to be put on the rack; which, albeit in matters of leſs danger, is great cruelty, yet in great and horrible crimes it is neceſſary. If the Offender have either confeſſed the crime, or be convicted thereof, then it followeth, that the party convicted, be puniſhed either by death or otherwiſe, according to the quality of the perſon, or condition of the offence. *Puniſhments* by *death* are foure, *Hanging*, *Burning*, *Heading*, and caſting the Offender to be *devoured* by *wilde beaſts*, amongſt which may be reckoned, Exile or Baniſhment, for that it takes away a mans liberty, and bereaves him of his country, which to every good ſubject, is as dear unto him as his life it ſelfe.

Puniſhments which did not inflict death, were many, and ſuch as it pleaſed the Magiſtrate in his diſcretion to appoint. The Law having paſſed upon the Offender in ſuch ſort, as ſhould be to the loſſe of his life, liberty, or countrie; his goods became forth-

forthwith forfeited to the Prince, ſuch (I mean) as are of value: but for the other, the Law alloweth them the priſoner, for his maintenance during the time of his impriſonment, and ſatisfying ſuch fees as are due to the Officers thereof; which hath place where the offender hath no children, otherwiſe one halfe of his goods commeth to his children, unleſſe it be in caſe of Treaſon, where all is confiſcated. They are alſo held for convict and guilty, which either upon a guiltineſſe of minde make away themſelves before Judgement, or ſtop their Adverſaries with a bribe, that they ſhall not follow the Law againſt them, and their goods are no leſs confiſcat than the others. But it is otherwiſe in thoſe which are baniſhed for a time, or to a certain place, or in ſuch as the Law having once paſſed upon them, are either in their life, or after their death, by the bounty and mercy of the Prince reſtored, in which caſe they recover Goods, Name, and Honour: the body being executed, the carcaſſe, for the moſt part, is granted to buriall, unleſs it be for matter of Treaſon, or other ſuch like offence. If any have been unjuſtly condemned, either by the iniquity or unskilfulneſſe of the Judge, the law alloweth him an appeale, that is, a provocation to a higher Judge, that he may hear the cauſe anew, and reforme that which is judged amiſſe into better: and if the higher Judge finde the partie grieved hath well appealed, he is to reverſe the former ſentence, otherwiſe to ſend the Offender back to the Judge, from whence he came, there to receive his puniſhment: yet ſome perſons there be, from

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whom no appeale lyeth, as from the Prince, or Senate, becauſe they repreſent the Prince, neither may hee appeale, which hath renounced his appeale. Appeales are made from lower Judges to higher, and from him that is Delegated, to him that did Delegate: Appeales are to be made within ten dayes after ſentence given, or within ten dayes after the Notice is come to the party againſt whom the Sentence did paſſe, unleſſe there attend thereon a continuall griefe, in which caſe, a man may appeale ſo long as the griefe indures: the time to aske Dimiſſorie Letters, is thirty daies from the Sentence given; the time to preſent the ſame to the Judge, is at the diſcretion of the Judge from whom; the time of proſecuting the ſame is a year, or, upon juſt cauſe, two years; in which time, if the ſuite be not ended, the cauſe is deferred, & to be ſent back unto the Judge, from whom the Appeale was firſt made: while the Appeale hangeth, nothing is to bee innovated, becauſe by the Appeale, the Judges hands are, as it were, bound: but if the former Sentence were voyde by law, (as in ſundry caſes they are) then there needeth no Appeale, for ſuch Sentences never paſſe into a caſe judged. Appeales in criminall caſes, cannot be juſtified by a Proctor; but it is otherwiſe in Civile Cauſes. An Appeale in one cauſe doth not exempt the party appellant from his owne Judge, in other cauſes: If the appellant die during the time of the Appeal, and leave no heire behind him, the Appeale ceaſeth; but if he leave an heire behinde him, and the matter of the Appeale concernes none but himſelfe, he is not to

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be compelled to follow it, for every one may renounce his own ſute: but if it concerne the Exchequer, or any other body, then may hee be compelled to follow it.

The Exchequer is the Princes Treaſurie, and the patrimony of the Common-wealth, and hath many and ſingular prerogatives, which private men have not. Such as are taken captive by the enemy, become their ſervants, who have taken them, unleſs either they eſcape home again themſelves, or be ranſomed by their friends; in both which caſes, they recover all right and priviledges they had in their own common-wealth Before. By the Law, all Subjects whatſoever, are bound to ſerve the common-wealth in warre; in ſo much that if any, being preſt, withdraw himſelf, or his child from it, he is to be counted as a rebell, and for his punishment, is to be baniſhed, and mulcted or fined in the greateſt part of his goods, As the priviledges and rewards of Souldiers were many to encourage them to vertue and manhood; ſo their ſhames and puniſhments were great, to feare them from cowardice and vice: But among the reſt of the priviledges of Souldiers, the old Souldiers were the greateſt. Of Subjects, ſome dwelt in Shires, and lived after their owne Lawes, and yet neverthelesſe were made partakers of the honours of the Citie: ſome other were inhabitants onely in the common-wealth, and had onely a houſe in the ſame place to dwell in, and had no right to bear office: ſome other were ſtrangers brought in, which were ruled by the Law of them among whom they dwelt. Amongſt

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those that dwelt in Shires, the chiefest Magistrate was he whom they called *Decurio*, who was not sent by the people of Rome thither (for he was a Magistrate of Magistrates) but elected by the people there, and his office was, to keep the treasurie of the Countrey, to provide victuall, exact tribute, and govern the state there, in manner as our Sheriffes doe here: his office was only *annual*, least by liberty and lust of government, and continuance thereof it might grow into a tyrannie. Such as are Subjects, are to serve the common-wealth in such offices, places, and services, as their ability is fit for, and the necessity of the common-wealth requires. The *services* of the common-wealth were of three sorts; *Patrimoniall*, such as belong to every mans patrimony to performe, which stood chiefly upon payment and charges, which were to goe out of every mans inheritance towards the performance of such burthen as lay upon him by law, custome, or command of him that had power thereto: *Personall*, which were to be performed by the care and industrie of the partie and his corporall labour, without expence of his purse: *Mixt*, which required both care of the minde, and labour of the body, and expence of the purse, and are imposed as well in consideration of the thing, as the person, which every subject is to undergoe, unlesse by the Law, or by the indulgence of the Prince they are excused; as some are excused by reason of old age, some by young age, some for their calling, some for their state of body, some for that they serve in the necessary services of the common-wealth at home, or abroad, as Embassadours do,

do, ſome for that they are in neceſſary places of ſervices for Gods Religion, as cathedrall Churches, and other Churches are; ſome for that they are of good and neceſſary places for Seminaries for the common-wealth, for learning and ſuch other imployments, as Colledges, Societies, and Schooles of learning and nurture are. Legates and Embaſſadors had immunity from all publick ſervices, not onely the time of their embaſſage, but alſo two years after their return; They were called Legates, in that they were choſen as fit men, out of many, their perſon was ſacred both at home and abroad, ſo that no man might lay violent hands on them without breach of the Law of Nations. Such as are Magiſtrates of Cities ought ſo to govern, that no negligence may bee juſtly imputed unto them, otherwiſe they are to anſwer it, and that when their office is expired, they give up a juſt account, both of what they have received, and what they have layd out; and pay in the reſidue, if there bee any. Governours of Cities, together with the conſent of the Burgeſſer thereof, may ſet down ſuch orders and decrees as are for the benefit and well ordering thereof, which are to be obſerved of all thoſe which are Inhabitants thereof, and being once well and duely ſet downe, are not to be reverſed, but to the good of the Citie or Commonalty. New publick workes, ſuch as are good for the Common-weale, every one may make without the leave of the Prince, unleſs it be done for emulation, or cauſe of diſcord, but for old works, in which ſtands the ſecurity of the Common-wealth, as Caſtles, Towers,

Gates, and Walls of Cities, nothing is to be done or innowated in them, without the Princes warrant; neither is it lawfull for any man to grave his name in any publick Worke, unlesse it be his, at whose cost the worke is done. Faires are authorized by Princes onely, and are invented for trade of merchandize, and uttering of wares which Countrymen have cause to buy, or sell: and have their priviledges, that no man in any Faire can be arrested for any private debt, they were called *Nundinæ*, because that among the *Romans*, they were anciently holden in one place or other upon every ninth day. Hee that for ten years space intermitteth to use his Faire, loseth the priviledge thereof. If any make any promise to a Citie or Common-wealth, to do any thing upon certain cause, as that hee might be made Consul, or that he would repair some part of the Citie that was burnt, he shall, by the Law, be compelled to performe his promise, for it is not meet that such promises should be satisfied with repentance. Such as professe liberall Sciences in any Common-wealth, whereby youth is instructed, & brought up to knowledge, or be School-masters, or Professours of Physick, or be Midwives, Notaries, Auditors, or Casters of accounts, or Registers, the Law alloweth, not only a competent stipend in recompence of their skill and paines, but also affords them means, how the same may be recovered if it be denied. But as for Philosophers and Lawyers, the Law hath appointed them no stipend, not because they are not reverend Sciences, and worthy reward or stipend, but because either of them

them are moſt honourable profeſſions, whoſe worthineſſe is not to be valued or diſhonoured by money: yet in theſe caſes many things are honeſtly taken, which are not honeſtly asked; and the Judge may according to the quality of the cauſe, and the skill of the Advocate, the cuſtome of the Court, and the worth of the matter that is in hand, appoint them a fee anſwerable to their place, as alſo to ſuch as are Interpreters between parties in matters of traffick, when one underſtands not an others language.

CHAP. II.

SECT. I.

The ſecond Volume of the Civile Law, is the Code, which is diſtributed into twelve Books. Why the Code is ſo called.

THE ſecond Tome of the Law, is the *Code*, and ſtands in *twelve Books*, whereof eight, for the Titles, follow in a manner the order of the Digeſt, a few titles only excepted, which are added, beſides thoſe of the Digeſt; but as for the four other, which are the firſt, the tenth, the eleventh, and the twelfth, although the ſubject they treat of be named in the Digeſt; yet the things which are there named, are not handled in the Digeſt; and therefore will I paſſe over thoſe eight other, leaſt happily I might ſeem to doe one thing twice, and therefore will I reſerre the Reader over to that which hath been ſaid of them before, in the handl-

ing of the Digeſt; for they are almoſt twinnes of one mother; ſo that whoſoever knowes the one, ſhall with no great difficulty diſcern the other, and come to the other four, yet not mentioned there: But yet before I lay open the matter thereof, I will in a word or two ſhew *why this Volume* of the Law *is called the Code*, *who is the author thereof*, and *out of whom* it was *collected*, what *moved* the *author*, after ſo many learned titles ſet downe before, of ſuch things as are in the Digeſt deduced, by ſuch a number of worthy Lawyers (as the Lawes of the Digeſt themſelves doe by their inſcriptions ſhew; for every law, carrieth with him in his forehead, the name of his Author) to make a new flouriſh of the ſame, and *what* the *knowledge* of the *Code* doth *conferre* unto a *Student* or practiſer of the Law, more than the knowledge of the Digeſt doth.

The *Code* therefore is named of the word *Codex*, that is, the trunke or timber of the tree, from which the barke of the tree is pill'd or pull'd off, of which men anciently uſed to make writing-tables, artificially binding them up into the form of a book, and uſing them for bookes, before the uſe of paper or parchment was known; inſomuch, as many of theſe tables being bound together, they were called a Code, or book: beſides, whereas the ancient Lawyers before *Juſtinians* time, uſed to write their pleas and anſwers in ſcroules of paper or parchment, *Juſtinian* himſelf firſt put them in a book, and therefore termed them by the name of a Code.

Why this Volume of the Law is called the Code.

What the Code is.

The Code it ſelf is compiled of the anſwers of 56. Emperours,

Emperours and their wiſe councell, whereof ſundry were learned and skilfull Lawyers, as the ſtorie of that time doth ſhew, and the lawes themſelves doe name ſome of them, as that moſt excellent and famous man *Papinian*, and ſome others; that is, from the dayes of *Adrian* the Emperour, unto the age of *Juſtinian* himſelfe.

The reaſon which moved the Emperour to compile the Code.

The cauſe that moved *Juſtinian* hereto, was, that in the Digeſt hee found not every caſe decided that fals out in common uſe of life (for how is it poſſible, when as every moment there fals out new matter, for which former lawes made no proviſion?) and therefore thought good to ſupplie that by new Lawes, which he found defective in the old: ſo that the multiplication of thoſe titles grew not, that the Emperour had any meaning, to fill the world with multitude of Lawes, for hee had found the inconvenience thereof already, and therefore had repealed and aboliſhed ſo many thouſand of old Lawes, as he had; but it came rather of that, that the multitude of cauſes were ſo many, that every day there fell out ſome unexpected thing that was never heard of before: beſide notwithſtanding the carefulneſſe of the Emperour himſelfe, and his great Lawyer *Tribonian*, and others, whom he uſed for the ſelecting and chooſing out of the pureſt, beſt, and moſt agreeing Lawes among themſelves, out of that indigeſted heap of Lawes he then aboliſhed; yet they were not ſo quick ſighted, but in that great worke, ſundry *antinomies* or contrary Lawes paſt them, which had need to be expounded and amended, and the Authors to be recited: Further, ſundry

of ancient Lawes were so subtilely written, that there was more wit than profit in them; so that it was expedient, the Emperour should explain the same, and putting all subtility aside, give a right sense unto the Law. Lastly, whereas many things were delivered by them briefly, and therefore obscurely, the Law-giver in his Princely wisdome, set out the same in other Lawes more plentifully and distinctly, all which were the chiefest causes, why the Emperour set out the book of the Code.

The difference between the Digest and the Code.

The Code neither in style, nor in method commeth to the perfection of the Digest, as that which for the style is a barbarous Thracian phrase Latinized, such as never any mean Latinist spake, whereas notwithstanding the style of the Digest is very grave and pure, and such as doth not much differ from the eloquentest speech that ever the Romans used; and for the method, it hath no particular disposition, other than such as is borrowed of the Digest it self, and otherwise is rude and unskilfull, where it doth recede from the same: yet doth it not lack his good use, for to such as follow the practice of the law, the knowledge of the Code is much more expedient than the knowledge of the Digest is, for that the lawes of the Code do determine matters in dayly use of life, which, because they are alike in all ages (for the same is evermore upon the stage, the persons a little altered) it cannot be but the learning thereof must be very profitable and expedient for the Common-wealth, whereas notwithstanding the learning of the Digest stands rather in the discussing of subtil questions of the Law, and enume-

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tions of the variety of opinions of ancient Lawyers thereupon, which have more commendation of wit, than benefit toward the common-wealth in them; but hereof hitherto.

CAP. II. SECT. II.

The Argument of the first Book of the Code.

THE *first Booke* of the *Code* treateth of *Religion*, and the Rites and Ceremonies thereto belonging, whereof I said there was no speciall Tractate in the Digest, saving that it divideth the publick right into that which concernes the Church, and Church-men; and the Magistrates of the Common-wealth, prosecuting the later branch thereof only, and omitting the first, because out of that Heathenish Religion, which was used in those ancient Lawyers dayes, and those superstitious Rites, whereof their Bookes were full, nothing could be taken that might serve for our Religion: whereupon he instituted a new discourse thereof in the Code, beginning first with the blessed Trinity, one in essence, and three in person, wherein he sets down a brief summe of our Christian faith, agreeable to the doctrine of the Prophets, and Apostles, and the *foure first generall Counsels*, the *Nicene*, *Constantinopolitan*, *Ephesine*, and *Calcedon*, forbidding any man publickly to dispute, or strive thereabout, taking occasion upon the *Nestorian* heresie, which not long before had sprung up, and had mightily infected the Church, which *Justinian*

by this confeſſion of Faith ſo publiſhed to the whole world, and a penall Edict joyned thereunto, hoped to repreſſe: After he hath ſet down a full and ſound confeſſion of the Chriſtian faith, conformable to the Primitive Church, next hee addeth a title of the holy Church it ſelf, and of her priviledges, which either concern Eccleſiaſticall mens perſons themſelves, or their ſtate and ſubſtance, or the actions one Eccleſiaſticall man had againſt an other, or with, or againſt Lay persons: where alſo he proſecuteth the degrees of Prieſts, or Miniſters, their offices, orders, and how the ſame are to be come by, (that is, without bribes or Simony, or other worldly reſpect, ſave the worth of the perſon only) and the rights of holy places. [Prieſts in the Law are called, from the Latine, *Sacerdotes*, either becauſe their office was *Deo ſacra dare*, to ſacrifice to God; or elſe, becauſe they were conſecrated, and as it were, ſevered from the reſt of the people, and given up to God: they were alſo called Elders, anſwerable to the Greeke Πρεσβύτεροι either for that they were ſo in age, * (the Law having provided, that no man ſhould be promoted to the dignitie of a Prieſt, till hee were 35 years old) or elſe, becauſe they ought to be ſuch in manners and careſull carriage of themſelves.] Amongſt Prieſts or Miniſters, Biſhops have the firſt place, who are, as it were, the *Overſeers and Superintendents of the reſt, ſo called of their watchfulneſs, care, labour, and faithfulneſs in teaching the people, and doing other duties, which they owe unto the Church. [The loweſt degrees of men in the Eccleſiaſtical Hierarchy, were

* *In Authent. de ſanct. Epiſcop. §. Presbyterum, Collat. 9.*

Ἐπίσκοποι

the

the Clerkes, as the word *Clericus* is reſtrein'd to a narrower acception. For in the generall, it is moſt properly applyed to all degrees of the Clergie, and is a terme contradiſtinct to the Laitie: and they are called Clergie, from the Greeke κλῆρος *quia de ſorte Domini ſunt, vel quia Dominus ſors eſt & pars Clericorum*, either becauſe God is their portion and lot, or becauſe they are his, as *Papias* hath obſerved.] To Biſhops, Prieſts, and other of that ranke, did appertain the care of Hoſpitals, whereof ſome were for Orphans, ſome for infants, ſome for impotent and diſeaſed perſons, ſome for poor people, ſome for ſtrangers, and other like miſerable perſons; and therefore together with the title of Biſhops and Clerks, is joyned the title of Hoſpitals, or Almeshouſes. In place next after the Biſhops themſelves, comes their power and audience; for albeit the chiefeſt office of a Biſhop, is to inſtruct the people in the doctrine of the Word, and in good example of life: yet forasmuch as all will not be obedient unto the Word, neither be brought by the perſuaſion thereof to good nurture, and to be kept in order, and the eminencie of the degree, where the Biſhops are placed, is not ſufficient to keep the people in obedience without ſome power and juriſdiction, and becauſe the Church it ſelfe is the mother and maintainer of Juſtice, therefore there is by the Emperour himſelf, and his predeceſſours, as many as profeſſed Chriſtianity, certain peculiar juriſdictions Eccleſiaſticall, aſſigned to the Biſhops, more worthy than the Civile, over perſons and cauſes Eccleſiaſticall, ſuch as touch the Soul and Conſcience,

ſcience, or do appertein to any charitable or godly uſes: and over the Laitie, ſo farre forth, as either the Laitie themſelves have beene content to ſubmit themſelves unto their government, that is, ſo farre as either it concernes their Soules health, or the outward government of the Church in things decent or comely, or that it concernes poor and miſerable perſons, ſuch as widowes, orphans, captives, and ſuch other like helpleſs people are, or where the Civile Magiſtrate cannot be come by, or doth voluntarily delay judgement; in all which, anciently a Biſhop was to performe double faith and ſanctity; firſt of an uncorrupt Judge, and then of a holy Biſhop. But in many of theſe matters in theſe dayes, the Laitie will not ſuffer themſelves to be controll'd, and therefore hath taken away moſt of theſe dealings from them, yea, even in charitable cauſes. Immediately followeth a title of Hereticks, Manichees, Samaritans, Anabaptiſts, Apoſtates, abuſers of the Croſs of Chriſt, Jewes, and worſhippers of the hoaſt of heaven, Pagans, and of their Temples and Sacrifices; whom the Biſhop is not only to confute by learning but alſo to ſuppreſſe by authority, for he hath not the ſpirituall Sword in vaine. The Hereticks, Jewes, and Pagans ſhall not have Chriſtian men and women to be their ſervants: that ſuch as flie to the Church for Sanctuarie, or claime the ayde thereof, ſhall not be drawn from thence, unleſs the offence be haynous, and done of a prepenſed and purpoſed malice, in which caſe no Immunity is to be allowed them, but wicked people are to be puniſhed according to their

deſert,

desert, agreeable to the word of God it self, which would not have his Altar to be a refuge unto the wicked? And so far of that part of publick right, which appertaineth to the Priests, or Ministers, and their Function, which was omitted in the Digest, but prosecuted in the Code. Now it followeth, that with like brevity I run over the three last Books of the Code, which themselves were rather shadowed in the Digest, in the title of the right of the Exchequer, than in any just proportion handled.

CAP. II. SECT. III.

The Argument of the tenth Book of the Code.

THE first therefore of them setteth out, what is the *right* of the *Exchequer*, and in what things it standeth, as in goods escheated, because there is no heire unto them, or that they are forfeited by any offence worthy death, or otherwise. How such as are in debt to the Exchequer, and their Sureties are to be sued. Of the right of those things which the Exchequer sels by outcry, where he that offereth most, carrieth it away, and how the same may be revoked, unless all rights and ceremonies be solemnly performed therein. How things that are in Common between the Exchequer and private men, may be sold, and that the Exchequer evict nothing that it hath once sold, for that, it were a thing against the dignity of the Exchequer, and would terrifie private men from bargaining with it. Of those that have borrowed mony out of the publick receipts, and what penalty they incurre, if they re-

pay

pay it not at their dayes covenanted, sometimes the forfeiture of four double of that they have borrowed, sometimes danger of life it self, That in cases of penalties, the Exchequer be not preferred before such as the Offender was truly indebted unto, but that they be first served, and then the Exchequer have only that which is left. What usurie the Exchequer may take, that is, for mony lent, and not for such summes as grow out of Mulcts and Penalties. That such sentences that are given against the Exchequer, may be retracted within three years following although ordinarily all other Sentences are irrevocable after ten dayes; neither can be reformed after that time, either by rescript of the Prince, or by pretence of new proof. Of the goods of such as escheat, by reason they have made no Will, and of the goods of Incorporations, that is, of such as dye without heires, that they come not to the common banke of the citie, but that they escheat unto the Prince: Of Promoters, by whose informations any goods are confiscate, either by reason of the goods themselves, for that they are adulterine, or that they are prohibited to be exported or imported, or upon some other like cause, or by reason of the persons that have offended, and crimes wherein they have offended, and their punishment, if they give in any wrong information, or other than such as they are bound unto by vertue of their Office: and that they give no information in, but by advise of the Attourny of the Exchequer, and that they make no information against their lord and Master, but in case of Treason, That it shall be

be lawfull for no man to make ſute unto the Prince for thoſe things that are confiſcated unto the Exchequer, as though it were more Honourable for the Prince to beſtow ſuch things on his Courtiers, than to keep them to himſelfe: and therefore, ſuch as are the Princes Secretaries, his Maſters of Requeſts, and others that are of his remembrance, are forbidden to make any Acts, Inſtruments, or other writings hereof, unleſſe the Prince of his own motion, and at no other mans ſute, will or command the ſame: Of ſuch as put themſelves into the Exchequer, upon any confeſſion made againſt themſelves: Of ſuch, to whom the Prince joyntly hath given any farm or like thing, that where one of them dyeth without an heire, the other may ſucceed him: Of Treaſure found, that the Exchequer be made acquainted with it; and that if it be found in a publick place, halfe goeth to the Exchequer, the other to the finder: but if it be in a private place, then half to the Lord of the ſoyle, and the other to the finder: Of proviſion for Corn, and ſuch other like: Of Tribute, which was an ordinary payment. Of impoſition & ſuper-impoſitions, which were payments laid upon the ſubject above ordinarie taxe, for ſome preſent neceſſity, to which charges, the ordinary taxe doth not ſuffice, which was not to be done, but upon great & urgent cauſe, by a Councell called together, and with the conſent of the ſubject: Of Collectors of the Subſidies, and in what manner they are to be collected and brought into the Exchequer, & of puniſhment of thoſe that in the collection thereof, extort more than is due; that it ſhal be lawful to diſtrain for Tribute unpaid: that ſuch acquit-

tances

tances in the Exchequer shall deliver unto the accomptants, shall be their full and finall discharge: and the Subsidie Books shall every quarter be sent up into the Exchequer with the account of the Collectors, that thereby it may appear how much every man hath paid or oweth unto the Exchequer: and that nothing may be done for the grievance of the poor, or the favour of the rich; Of the Book of accounts of yearly gifts that commonly Subjects present unto the Prince at New-years tide and otherwise, and that they be divided from the accounts of the Exchequer: That no man be freed from the payment of Tribute: Of spending out such ancient grain, and other like provision, as is laid up in the common store-house, and making provision for a new, and compelling the Subjects, such as have plenty of such grain, if it happen to be vinoed and mustie, to buy the same, that the whole losse thereof may not lye upon the Exchequer: What pension such Mannors as the Prince hath given or released from payment of Subsidies shall give, and that no man be so hardy, to beg such a matter of the Prince, lest the revenues of the Exchequer be thereby diminished: Of mannors that have been translated from the payment of one kind of provision to an other; or that have been in their taxation over-rated: Of Brass that Minerall Countries are to yeild, or money in lieu thereof, Of Controllers, whose Office it was to cast over again such accounts as were brought into the Exchequer, or to examine them a-new, lest perhaps, there might be an errour in them.

And

And ſo farre as concerning thoſe things which doe appertain to the account of the Exchequer, or the patrimony thereof, or ſuch penſions or payments, as are due unto the ſame. Now followeth the other part of this tenth Book, which containeth the burthens, duties, or offices impoſed on the Subject in the Exchequer, and what excuſe the Subject might alleage in this behalf.

Burthens or duties, were either perſonall, as places of Honour, which were not to be continued from the Father to the Child; or they be Patrimoniall, which are charged upon mens inheritance, either for the good of the Common-wealth, or to enrich the Exchequer againſt dangers that are like to enſue: which are undertook and performed either by thoſe which are of neceſſity to obey that which is enjoyned them, or by thoſe which offer themſelves voluntarily thereto, which ſeldome happeneth in patrimoniall charges: but in matters of Honour and Perſonall ſervices, it many times commeth to paſſe, that men excuſe not themſelves from bearing of offices, or doing of perſonall ſervices, although they have an immunity from them, either by the grant of the Prince, (which is to be underſtood of extraordinary ſervice only, and not of ordinary) or by the benefit of the Law; for by the Law men are many times upon juſt cauſes excuſed from Perſonall ſervices, ſo it be not from ſuch ſervices as no man can excuſe himſelfe from; ſuch as are Poſtings and carriages, when the Prince paſſeth by, or the Tenure of his Inheriance do ſo require it, and the erecting and repairing of Bridges, Wayes

and

and Walle, the provision and carriage of Corn, and other like kinds necessary for the maintenance of the Princes house. Men are excused either generally from all kinds of services, or particularly from some: as all Minors, specially such as are Students in any famous University; whilest they give themselves there unto their book, are excused from all Personall services, but not from Patrimoniall services; as also all old men of the age of seventy years and upward, all professours of Liberall Sciences, whereby the common-wealth is benefited, all professors of Physick, Grammar, Oratorie, or Philosophie, so they be allowed by the Magistrate and seven skilfull men, in the profession which they make shew of, & be not *Supernumerarii*, or above the number of those that are to be allowed, in which number are neither * Poëts nor † Auditors: they are also excused, which upon just cause are dismissed, either out of the Army, or out of the Schooles, either for lack of health, or that they are so wounded, that they can neither serve in warre any longer, nor longer indure studie, which are so to be understood, that they yeild excuse from Personall services only, and not from Prediall.

* *Poëtæ nullâ immunitatis prærogativâ juvantur. Cod. de Profess. lib. 3. lib. 10.*

But the Interpretation is more mercifull then the Text. For the Glosse saith, *Poëtæ hoc ipso quòd Poëtæ immunitatem non habent, non quòd eam Divini Spiritus non mereantur; sed quod lex deficit.* † The Law hath it; *Non etiam Calculatores. l. 4. De Profs. & Med. lib. 10. Cod.* And *ff. de Excus. Tut. l.* Σπάνιον τὸ Μηδὲ χαλκιδικὸς (οὓς διαψηφιστὰς λέγουσι) ἔχειν ἀλυτουργησίαν λέγειν δὲ διαψηφιστὰς; where the Law expounderh *Calculatores* by διαψηφιστὰς, that is, saith *Brisson* and the Glosse, *qui artem numerandi docent:* answerable to that which *Cujacius* hath noted out of the *Basilica*, Οἱ ψηφίζειν ἡμᾶς διδάσκοντες, and then it may be thought that the Law here meaneth by *Calculatores*, those that taught to cast an Account Ciphering-Masters.

Those

Those things that yeild excuse in part, from personall services are these: the Renting of the Princes customs, the baseness of the persons state, not fit to bear any Office of credit, infamie, banishment, an amotion from a mans place and degree, feminine sexe, which are to undergoe such Offices onely, as are agreeable to their sexe. Embassages imposed upon any by the Prince and his Councell, which hath immunitie also of two years after their return, if the Embasse were into places beyond the Sea, or into any farre Country, not if it were into any country neer at hand. Skill in any mannall Art or Mysteries, to the intent that they may have both time to learn their Arts and so become the skilfuller in the same, and also have more alacrity to teach others in their Mysterie. That care be had, that such be chosen to Office, that be of the worthier sort for their vertue and place, and the richest of their state: that no man be chosen to office for envie, and if any be, and the same be proved, he that did choos him thereunto is to be fined, and to pay the expenses of the sute, unlesse he, which is chosen die within a short time after the choise, then his successors are not bound thereto. Further, men are excused, if being in one office, they are chosen into another, to the intent, they may the better execute and performe that office they have in hand: Such as are Remembrancers, which make Books of what is due to the Exchequer, and what is brought in, Auditors, Receivers, Tellers, Granarers, Weighers, such as weigh and try such Gold, as is brought and paid into the Exchequer; Collectors,

that is, such as gather up the gold that is due in the Provinces to the Exchequer, and send the same over into the Exchequer, who are in no case to hold the same longer in their hands than the Law allowes them, much less to turn the same to their own use, without great offence to the Prince and common wealth: the like is for a Crown of Gold that is, such gold that is put in Crowns, and offered to the Prince upon any publick gratulation, or any exploite that hath been happily atchieved.

Justices of Peace, which are distributed by countries, for the more quiet and peaceable government of the same, whose care was to seek out theeves and malefactors, and to foresee that the country people did make no mutiny, by reason of the Taxes and Subsidies that were levied upon them: that for gold, there might be paid silver, and again silver for gold in the Exchequer, so that the value thereof were made equall. Usurers, although they have no possessions, yet they are no less bound to Patrimoniall or Predial charges, than if themselves had Lands and Hereditaments, although for their infamie, they are excluded from all Personall charges that are of credit.

CAP. II. SECT. IV.

The Argument of the 11. Book of the Code.

THe eleventh Book proceedeth in the enumeration of other vocations, that are exempted from personall services of the common-wealth, be-

thoſe that have been named in the tenth Book: as Maſters of ſhips and Mariners, which ſerved to bring in any Merchandiſe or proviſion for the Princes houſhold, out of forreine Countries into the Princes ſtore-houſe; yea, although they were private mens ſhips, which were imployed to that ſervice, ſo that if a private mans ſhips were laden with any publick proviſion, there could not any private burthen be impoſed upon him: for if the ſhip periſh by ſhipwrack, by reaſon of the private burthen that is put therein above the publick charge, then he is to anſwer the loſſe thereof unto the Exchequer, otherwiſe than in the caſe of private men, who are themſelves to bear the loſſe of thoſe things which are exported or imported; neither can they make gain of private mens ſhipwrack, or of thoſe things which are caſt out into the ſea, to eaſe the lading of the ſhip, but are bound to reſtore it to the owner, under pain of confiſcation of their goods by the Temporall Law, and excommunication of their perſons by the Eccleſiaſticall Magiſtrate. Adde to this, Myners or Metallers, and the governours of the ſame; gatherers of Muſſles and other like ſhell-fiſh, with whoſe blood, either purple is made, or out of which Pearles are taken: which colour Princes onely might uſe, as alſo Velvet and cloth of Gold; neither was it lawfull for any man (under the degree of the Prince) to wear the ſame, ſaving only women in ſome ſort, for that ſuch Ornaments are fitter for women than men. Joyne to theſe Moneyaries, which ſerved to coyne money, Wain-men

or Car-men, which with their own cattel carry or conveyed things, which belonged to the Prin Treasurie. The like priviledge had they wh made Armour for the Princes Armorie, as Spea Brest-plates, Darts, and such like; or made Brid Girdles studded with pearl or precious stone u the Court, for the Kings houshold, who on were allowed to wear the same. Such as had t care and government of any Corporations, as t Princes Bakers, Vintners, Paper-sellers, Mone changers, professours of Liberall Sciences, specia in *Rome*, and *Constantinople*, which after the se of the Empire was translated thither, had all th priviledges of old *Rome*, saving the Ecclesiasti primacie, for which, notwithstanding there wa long dissention between the two Cities.

Next after *Rome* and *Constantinople*, * *Berytu* chiefe Citie of *Syrophœnicia* had great priviledge for the famous Universitie which was in the sam and such Provinces or Countries as served th same, or any of them with yearly provision o Corn, Oyle, Beef, Mutton, Pork, and such oth like victuall: which provision was to be distribute among the poor and impotent of the Cities, and not to be given to stout and valiant beggers, whi are able to get their living with their own hand and therefore were to be compelled to work. Th Aldermen and Governours of Cities, for that the are imployed in matters of greater services, y none of them were to be called to any Office, befo he had been even with the common-wealth, if hap pily any of them were in debt to it; neither were they

* Nullius rei indiga, *as* Patricius *hath it. In the Emperours dayes it was much renouned for the study of the Law:* Digest. Proem. §. Hæc autem: unde Impp. Theodosius & Valent. AA. eam urbem Metropolitano nomine ac dignitate exornârunt, *as* Brisson *relateth.*

they or any of them excuſed more than from perſonall ſervices, but in prediall duties, they payd every one according to his rate. But as for Enterludeplayers and houſes of baudery, they had no exemption at all, but paid double charges to the reſt. Of husbandmen, ſome are ſervants, as Copy-holders, others are free, as Free holders, who notwithſtanding themſelves are, as it were, bound unto the ſoyle, and are rated in the ſubſidie according to their Acres, and if they have no Land, then according to the head or number of their houſhold; which notwithſtanding, at this day, is taken away; and theſe, as well pay rent to the owners of the ground (wherein notwithſtanding the Landlord cannot exact of them, or charge them above that which hath been covenanted between them) as Tribute, and Headſilver to the Common-wealth: for the declining of which, and avoyding of neceſſary ſervices of the Common-wealth, as no man can put himſelf under the patronage of any Noble man, ſo alſo they cannot be called from this ſervice of the Common-wealth, to any other. Countrymen, ſuch as were addicted to the ground they tilled, although the ground were their owne, yet could they not ſell it to any man, but to him that was of the mother-village wherein himſelfe was. A Mother-village was that, whence all the villages round about were derived. Although all ſuch husbandmen as dwell in any village, are to pay ſubſidie for ſuch goods as they poſſeſs, or ſuch Lands as they hold, yet one neighbour is not to be diſquieted or arreſted for an other mans due, for that it is a thing

unlawfull to trouble one for another, or not to cess men indifferently, according to the value of their lands, and the worth of their goods: and therefore the *Romans* in rating of matters of taxes, had first Cessers which rated men according to that which they thought their state to be: then had they Levellers or Surveyors, who considerd the rate set down, mended it, and made it even, easing such persons or grounds as were over-rated, and charging more deeply such others as were overlightly taxed, procuring that such grounds as were waste and barren, should be brought to tillage, and that the barren should be joyned with the fruitfull, that by such meanes the Prince might receive subsidie out of both: March-grounds, and such as lie in the bounds of any kingdome, serve for the maintenance of such Garrisons as are there placed for the defence of the Marches, and such as hold the said lands are to pay a yearly provision or pension for the same; as also the Princes pastures, woods, and forrests, which are let out upon a certaine yearly rent, either for a certain time, or in fee farme for ever, which in respect they pay an ordinary payment to the Prince either in mony, or in provision, are discharged from all other ordinary and extraordinary burthens. Publick things are those which appertaine to the Exchequer, or to the Church, which may in like sort be rented out for a season, or for ever, as the possession of the Exchequer may, so it be done to the certaine benefit of the Church, and under such solemnities, as in this case are required, otherwise it cannot be let out but for 30 yeers

or for three lives. Fee-farme is, when the lands and tenements, or other hereditaments, are let out for ever, under a certain yearly rent, in reacknowledgement of the Soveraignty thereof, belonging still to the first Lord, whereby both the right and possession passeth to the former in fee.

CAP. II. SECT. V.

The Matter of the 12. Book of the Code.

THE third and last of these Books, treateth of the Honours that the Exchequer giveth; of which the first and chiefest was the Pretorship, which anciently was a great dignity, but after became an idle name only, and a burthen to the Senators, as in which at their own charges they were to set out playes and shewes, and gave unto the Emperour, in consideration of his or their glebe land, a certain quantity of Gold called *Aurum glebale*, or if they had no glebe land, then offered they to the Emperour another piece of Gold, called *Follis aurea*, both which afterward were taken away. Next was the Consulship, which was not to be sought by ambition, or by scattering money among the people, but by cleer suffrages and desert: After the Consulship came in place the Constable, or Master of the Souldiers, and those which were called *Patricii*, for that their fathers had been Senators, whose place under *Augustus* was equall to the Consuls, although they were in no office and function of the common-wealth; and the other is

not so much an administration as a dignity, as the Senatorship anciently was, into the which they who were admitted, were accounted as Parents to the Prince, and Fathers to their Country: Fourthly in place were the Princes Chamberlains, who were adorned with sundry priviledges, and had the title of honour: Fifthly followed the Treasurer, who was Master of all the receipts and Treasure of the Prince, publick or private, & of all such officers as were underneath him: then the Prenotary, chief Notary or Scribe of the Court, who was called *Primicerius*. To this purpose note, that the Ancients for want of those more proper materials, which experience hath discovered to our times, were wont to write in waxen Tables, as may be observed out of the *Junior Plinie* in an Epistle to *Tacitus*. Note also, that upon occasion given for inrolling of their names, who bare any office or dignitie, the use was, to set the highest degrees *in primâ cirâ*, in the first place of the Table, from hence they were called *Primiceri*: therefore he that is chief of any dignity or office, may be called *Primicerius*, according to that of *Phavorinus*: Πρωτοκλισία ἐστὶ πρώτη ἐν συμποσίῳ, the first of any * order: hence it is, that we find in *Godin*, *Primicerios Aulæ*, *Lectorum*, *Barangorum*, &c. and for this cause, the Law here calleth the chief Notarie *Primicerium*. After him that was first Secretarie, there was an other, called *Secundicerius*, the second Secretarie, and after them, other Clerks of the Councell, who were not all in one degree, but some were first, some were second, and so in order, as their person, place, and time did require: Over whom was the Master of the Rolls, who

Lib. 1. Epist.

* *Austen* calleth S. *Steven Primicerium Martyrum*, and the Archbishop of *Dole* in his History of *Jerusalem* called S. *Peter Primicerium Apostolorum.*

who now is called Chancellour, and such as are of the Princes privie Councell, or Assessors of his priuy consistorie, wherein he heareth Embassages, and debateth the greatest affaires of the State, and other weightie matters. The President or Tribune of the Schools, where young men were trained up to feats of Armes. The Martials or Presidents of Militarie affaires: the Physitians of the Princes body, *Constantine* in old time honoured with the title of Earles, as he did the rest of his chief officers, but now they are without the dignitie of that title: The Earles of the Countries who governed the Provinces or Shiers whereof they were Earles: Professors of Law, and other sciences twentie years together, deserved by the Law to be made Earles. The Porters of the Court, and the Princes watch, which watched nightly for the defence of his body, the guard or Protectors of the Princes Body, and their Captaine, among which were chief the Standerd-bearers, as in whom the Prince reposed most trust, and used them chiefly in all matters of danger. Next unto the Chancellour, or Master of the Rolls, were the Clerks, and others that served in the Rolls, in which the decrees and rescripts of the Prince, the Supplycations of the subject, and the orders thereupon set down are recorded, laid up, and kept, as the Rolls of Remembrances, of Epistles, Libels, Ordinances, Gifts given by the Prince, & such like: besides such as serve the Prince not in matters of learning, or warre, or the pen, or other like places above named, but in actions of the Commonwealth, and in publick offices either of peace or

warre, and their Presidents or Governours, among whom are Post-masters, to whom the care of the publick course doth appertain: the Treasurer of the Chamber, who hath the keeping of the privie purse, and such things as come to the Prince by way of guift; the Master of the horse, his Queries and riders; the yeomen of the Styrop, and the Princes footmen? the * Castellians or officers of the houshold, which were part of the Princes family, appointed for the inward services of the Prince in the Court, as his Tasters, Butlers, Waiters, Chamberers, and such other, and their Governours, Harbingers, which upon remove provide for the Princes lodgings; all which had sundry priviledges and immunities, for that they were all accounted as Souldiers, as also the eleven † Schooles for Henchmen, wherein sundry youthes, under masters appointed for that purpose, were trained up, some in learning, some other in Military discipline, that they might be made fit for the service of the Prince and common-wealth, and had for their better education an *annuall* allowance of the Prince; and from thence when they were sufficiently instructed, or trayned up, were sent out to such services as they were fit for,

* *They are called in the Title* Castrenfiani. Cod. De Cast. & Minist. l. 12. *And these were* Pars Regiæ familiæ Servitiis & Ministeriis Principis interioribus, in aulâ & castris devota, ut Præguſtatores, Pincernæ, Vestitores, Pistores, &c. Cujacius hic, & Weetenbec: in Oeconom. Juris pag. 225.

† *Schooles in the Code are* Corpora sive ordines officialium, hoc est, eorum qui munere & officio aliquo quod ad Principis Ministerium pertineret, fungebantur, Prat. *Concerning these, see* Panciroll, *upon the* Notitia imperii. *The Author whereof* (Marian a Scot *if it be as* Cujacius *saith*) *reckoneth no more then ten Schooles, but the Emperour maketh mention of eleven.* Cod. de Locat. & Cond. l. fin.

Of

Of such as were attendants about the Prince, and were imployed in his service: the chiefest of all were the Senators, and therefore are called in the Law, the Companions of the Prince, and have all the priviledges that Souldiers have: The Second order was of them that are Knight-riders, which either did or might serve in warre: in the third rank where such as were in dignity. All may be compelled to serve in warre, which have neither just excuse, nor exemption, nor have any leave of the Captaine to be absent, unlesse they be Merchant men, or be indebted unto the common wealth, or obnoxious to the Law, for any crime they have committed.

Under the title of Militarie discipline is declared, how men are to be trained up to the knowledge of warre, what oath is to be taken of such as are prest to be Souldiers, how they are to be distributed into bands, what use or benefit the common-wealth hath by them; what is their office and how they are to be mustered, or else translated from one degree to an other, how they are to be judged if they offend, what priviledges belong unto them; what stipend or wages is due unto them, as allowance of Corn, and the baking of the same into bisket, which was a kind of bread twice baked for the better durance of it, and the charge thereof from place to place, so often as they happed to remove; their livery or apparell, and the times of the delivery of the same, or money instead thereof, lodging, and provision of salted meat the longer to endure: how long Souldiers may be absent from the Camp, and who

is

is to give them leave for absence, and what is the punishment of them, that without just cause be longer absent from the Armie, than they have leave. Of young souldiers, and of their training up; of old souldiers, and of their priviledges: Provision for keeping safe the Sea coast, and ordinary high wayes of the Countrie, that such as journey may passe free without hurt or dammage; of runnagates out of the Army, and such as conceale them, and of either of their punishments: of the sons of such Officers as have dyed in the war, and of their preferment, if any be fit for it, that they succeed in their fathers office or roome: Of the Sergeant Major, the Clarke of the band, and other such officers of the Campe, and of their office, reward and punishment: of places disposed of, for publick posts, and carriages in high beaten wayes, and other by-wayes on necessity, and how the same & the Cattle are to be used, that is, that they be not driven forward with staves or clubs, but with whips onely: and that no post-horse, or carriage be taken, but for use of Post-letters; to whom they are to be granted, and for what time: Of the Apparitors, Sergeants, Summers or Bayliffes: Of sundry great officers and of their Scribes, and Registers, and of their tryals: Of the fees of Advocates, and of the extortion of Apparitors. And this is the summe of those things which are specially contained in the Code, besides other things which it hath, common with the Digest, the knowledge whereof at this day, is not so necessary for the Civilian (who in his age hath little use thereof) as it is expedient for Councellors

Councellors of State, and ſuch as are called to place in Court, who may thereout marke many things to direct them in their place, as the variety of thoſe things which are herein handled doth very well ſhew.

CHAP. III.

SECT. I.

What the Authenticks are, and why they are ſo called.

THE third Volume of the Law is called the *Authenticks*, of the Greek word αὐθεντῶν, either becauſe they have authority in themſelves, as proceeding from the Emperors own mouth, or that they are originals to other writings, that are tranſcribed out of them.

The Authenticks therefore, are a Volume of new Conſtitutions, ſet out by *Juſtinian* the Emperor, after the Code, and brought into the body of the Law under one Booke.

In the Authenticks, is not that order obſerved in the diſpoſition of the Lawes, as is either in the Digeſt, or the Code, but as occaſion was offered of any doubt, wherein the Princes reſolution was neceſſary to every thing, ſo it is ſet down without any other methode or forme.

The

The whole Volume is divided into 9. *Collations*, *Constitutions* or *Sections*; and they againe into 168. *Novels*, which also are distributed into certain Chapters.

They were called † *Novels*, becauſe they were *new Lawes*, compared to the Lawes of the Digeſt, or the Code.

Of theſe Conſtitutions ſome were generall, and did concerne all, who had like cauſe of doubt; ſome other were private, and did concern only the place or perſons, they were writ for, which I will overpaſſe with ſilence.

* In the latine translation for the Greek text acknowledgeth not this diviſion into Collations.

† *Quid novissime promulgata sint post Cod. Justin. Repetitæ Prælectionis:* and therefore the Greek calleth them νεαρὰς μετὰ τὸν κώδικα: ſo likewiſe the conſtitutions of the Emperours, which were newly publiſhed after the Βασιλικὰ, were called the Novels of *Leo*, *Nicephorus*, *Michael*, &c.

CAP. III. SECT. II.

The ſumme of the firſt Collation.

OF the generall, the firſt title and firſt Novell of the firſt Collation is, that Heires, Feoffees, Executors, Adminiſtrators, and their Succeſſors, ſhall fulfill the Will of the deceaſed, and within one yeare after his deceaſe, ſhall pay his Legacies and Bequeſts: and if they be once ſued for it, they ſhall forthwith pay that which is due upon the Will, (deducting only a fourth part, which is due unto the heire by the Law *Falcidia*) or elſe, to loſe ſuch bequeſts, as themſelves have in the Will.

That it ſhall not be lawfull for a Widow, coming to a ſecond marriage, after her firſt husband is dead

dead, to sequester one of her children from the rest, upon whom shee will bestow such things, as her first husband gave her before marriage, but that the benefit thereof shall be common to them all: Neither that she convey it over to her second husband, or his children, and so defraud her first husbands children. And that a man in like sort surviving his wife, shall doe the like toward his first wifes children, as concerning such Dowry as the first wife brought to her husband.

Of Sureties and Warranties, that the Creditors shall first sue their Debtors, and take execution against their goods, and finding them not payable, shall then take their remedy against the Sureties.

Of Monkes, that they build no Monasteries, but with the leave of the Bishop, who is there with prayer to * lay the first stone: And that the Bishop shall appoint such an Abbot over the Monkes, as in vertue and in merit excels the rest: And besides of their habit, conversation, professions, and change of life, and who is to succeed them in their goods and inheritance.

Of Bishops and Clerks, that is, that Bishops and Clerks be of good fame, of competent learning, and age, and that they be ordeined and promoted without Simonie, or briberie, or the injury of the present Incumbent: And that there be a set number of Clerkes in every Church, lest the Church and Parishioners thereby be over-charged.

* But the Emperour maketh no mention of this Rite; for thus saith the Law: None shall presume to erect a (Church or) Monasterie, till the Bishop of the place, beloved of God, having been made acquainted with it, shall come, and lift up his hands to heaven, and consecrate the place to God by prayer; πρέσβεις δὲ καὶ αὐτὸς τὸ τῆς ἁγιότητος σύμβολον σημείου (φιλόθεος ὢν καὶ θεοσεβέστατος καὶ τίμιος ὄντως εὐχῇ:) and there erect

erect the Symbole of our Salvation, we meane, the venerable and truly pretious Rood. *In Auth. De Monach. §. Illud igitur. Coll.* 1. See also Novell. 123. & 131. And the like is commanded in the Basilics, Τὸν δὲ οἰκοδομεῖν ἐκλόμενον Μοναστήριον φεγγιαλεῖν λέγει ἡμῖν φασὶ τὸ ἐπίσκοπον καὶ πρῶτον Σταυροπήγιον: Yet that this laying the first stone, hath been of ancient use in the Greek Church, may be observed out of their Euchologue, where it is said, that the Bishop, after some other Rites performed, οὕτως ἐν τῷ τόπῳ ἐν ᾧ τὸ ἅγιον τραπεζάριον μέλλει ἱδρύεσθαι λέγει τὴν εὐχὴν καὶ μὴ πρὸ τῆς εὐχῆς ἐπιλύσῃ, εἶτα λαβὼν ἕνα τῶν λίθων καὶ χαράξας ἐπὶ αὐτὸν σταυρὸν, ἀυτὸς ταῖς ἰδίαις χερσὶ τιθησιν αὐτὸν ἐν τῷ θεμελίῳ τόπῳ. Ἐθεμελίωσεν αὐτὸν. &c. καὶ ὕστερον ἐπὶ τῆς εὐχῆς ἀπολύσῃ ἡ ἀρχιτεκτονικὴ ἄρχονται: standing in the place where the holy Altar shall be set, saith a prayer, which being ended, he giveth the *Ite Missa est*, and then taketh up one of the stones, and having cut a Crosse upon it, himselfe with his own hands layeth it upon the Ground-worke, then he pronounceth the Ἐθεμελίωσεν αὐτὸν. &c. and so the Work-men begin the building. That which followeth in the Euchologue, discovereth the forme and manner of setting up the Crucifixe, which the Law calleth Σταυροπήγιον: the Reader may see εἰς φυλλ. ουα. of the Euchologue. The like Ceremonies are used in the Latine Church at this day, as may be seen in their *Pontificiale*, page the 281. of that which *Clement* the 8. set out at Rome, in the year 1565.

CAP. III. SECT. III.

What is conteined in the Second Collation.

THe second Collation treateth of the Churches State, that the land, of the Church be neither sold, alienated, nor changed away, (but upon necessity, or that they be let to farme for a time, or upon other just cause) no not with the Prince himself, unlesse the change be as good, or better, than that which hee receiveth from the Church: and if

any

any man presume contrary to this forme, to change with the Church, hee shall lose both the thing he changed, and the thing he would have changed for it, and both of them shall remaine in the right of the Church: And that no man give or change a barren piece of ground with the Church.

That Judges and Rulers of Provinces bee made without gifts: of their office, power, authoritie, and stipend, and that they sweare, they shall so sincerely and uprightly execute their office, as knowing they shall give an account thereof to God and the King; which oath they shall undergoe before the Bishop of the place, and the chief man of that Province, whither they are sent to be Judges or Governours.

Of the Masters of Requests and their office, which offer to the Prince suters Petitions, and report them back from the Prince unto the Judges.

Of wicked and incestuous Marriages, and that such as marrie within those degrees, forfiet all that they have unto the Exchequer, for that when they might make lawfull marriages, they rather chuse to make unlawfull marriages.

CAP. III. SECT. IV.

The Argument of the third Collation.

THE third Collation conteineth matter against Bawdes, that they be not suffered in any place of the Roman Empire, that being once warned to forbeare their wicked profession, if they offend therein again, they die the death therefore. If any

man let any house to a bawd, knowing him to be a bawd, that he shall forfiet * x. li. to the Prince, and his house shall be in danger to be confiscated.

*Sciat se dexem librarum auri sustinere pœnam, & circa ipsam periclitarum habitationem, In Auth. De Lenonibus Sect. Sancimus. Coll. 3.

Of Majors and Governours of Cities, that such be chosen that be honest people and men of credit, and that no man of the Citie being thereto chosen, refuse the same, and that such as are thereto chosen, shall sweare they will proceed in every matter, according to Law and Conscience.

That there be a certaine number of Clerkes in every Church, and that it be neither diminished, nor increased, and therefore that there be a translation of those that abound in one Church, into an other Church that wanteth.

The precepts which Princes gave to Rulers of Provinces, were these in effect, that whereas themselves were freely chosen thereunto, they should in due sort and order goe into their Provinces, that they should keep their hands pure from bribes, that they should carefully look unto the Revenues of the Exchequer, and the peace and quiet estate of the Province, represse outrages and rebellions, procure that causes be ended with all indifferencie, and ordinary charges: to foresee, that neither themselves, nor any of their officers, or under ministers, doe injurie to the people, and so those that ought to helpe them, should hurt them: To provide that the people want not necessary sustenance, and keep the Walls of the Citie in reparation: that they punish offences according to the Law, without respect to any mans priviledge, neither admit any excuse in the examining or correcting of the same, save in-

nocencie

nocencie onely: that they keep their Officers in order: that they admit to their Counsell such as are good men, & are milde towards such as are good, and sharp towards such as are evill: that they afford not Protections to every man, neither to any one longer than it is fit and convenient it should be: that where they remove, they vex not the Countrey-men with more carriages than is needfull: that they suffer not Churches, and other like holy places, to be a Sanctuarie to murtherers, and other such like wicked men: that they suffer not Lands to be sold without fine made to the Exchequer: that they regard not Letters or rescripts, contrary to Law, and against the weale publick, unlesse they be seconded: that they suffer not the Province to be disquieted under pretence of Religion, heresie, or schisme, but if there be any Canonicall or ordinary thing to be done, they advise thereabout with the Bishop: that they doe not confiscate the goods of such as are condemned: that they patronize no man injustly: that no man set his Armes or Cognisance upon an other mans Lands, neither that any carrie any weapon, unlesse he be a Souldier.

What is an hereditary portion, and how children are to succeed: of such as deny their own hand-writing, and * how they are to be punished, as well in personall as in reall actions: and that such deniers after their deniall be not admitted to other exceptions: and the taking away the thing in controversie from him, which denied the true owner to be Lord thereof.

*Auxiliabuntur autem tibi ab hoc etiam Deo amabiles Ecclesiarum defensores Le Manda Princip. § Neque autem homicid.

* Condemnationem adversus eum duplicem in utroque casu fieri sancimus. De Inrent. & semiss. § Studium vero.

CAP. III. SECT. V.

What is comprehended in the fourth Collation.

THe fourth Collation handleth matters of Marriage, and that marriage is made only by consent without either lying together, or instruments of dowry: Of women that marrie again within the year of Mourning; which by Law in sundry sorts were punished, for confusion of their issue: that there be an equall proportion in the Dowrie, and the Joynture: Of divorce and separation of marriages and for what causes, by consent, for impotencie, for adulterie: and that Noble women which after the death of their first husband, being Noble personages, marrie to inferiour men, shall loose the dignitie of their first husband, and follow the condition of their second husband.

Of Appeales, and within what time a man may appeale and from whom, and to whom the appeale is to be made.

That none which lends money to a husbandman, take his land to morgage, and † how much usury money a man may take of a husbandman.

Of her that was brought to bed the eleventh moneth after her husbands decease, and that such as are borne in the beginning of the same moneth are to be accounted for legitimate, but such as

† *Nihil amplius quam sili quam unam pro singulo solido annuam præstiar. Ne quis quod Agricol. §. Sancimus.*

are

are * born in the end thereof, are to be holden for baſtards.

Of inſtruments and their credit, and that in every inſtrument there be Protocols left, that is ſigned and notes of the time when ſuch a contract was made, and who was notorie and witneſſes to the ſame, and that after it be written fair, and engroſſed in a lidger or fair † *mundum* Book.

* The Gloſs reciteth a matter of fact contrary to this Law: A widdow in *Paris* that was delivered of a child the 14. month after her husbands deceaſe, nevertheleſs, the good repute which was generally conceived of this womans continencie, prevailed ſo much againſt the letter of the Law, that the reverend Judges awarded the cauſes of child-birth to be extraordinarie, the woman to be chaſte and the child legitimate: *Hæc tamen in exemplum trahi facile non oportet*, as the Gloſs there concludeth.

† χάρτιον ἐγγράφων : *Chartam purum.*

CAP. III. SECT. VI.

What is compriſed in the fifth Collation.

THe fifth Collation forbiddeth the alienation or ſelling away the immoveable poſſeſſions of the Church, unleſſe it be done under certain ſolemnities, and then onely when the moveable goods are not ſufficient to pay the debts of the Church or holy place.

Further, it provideth that the name of the Prince for the time being, be put in all inſtruments, and the day and yeare when the inſtrument was made.

That the Oath of the deceaſed, as concerning the quantitie of his goods, ſo farre as it toucheth the deviſion of the ſame among his children, be

holden for good, but that in be in no sort prejudiciall to the creditors.

Of women tumblers, and such other of like sort, which with the feats of their body, maintain themselves, that no oath or suretie be taken of them, that will not leave that kind of life, since such oath is against good manners, and is of no value in Law.

That such gifts as are given by private men to their Prince need no record, but are good without enrolling of them, and in like sort such things as are given by the Princes to private men.

That no person, thing, or Gold of an other man be arrested for an other mans debt, which now they call reprisals, and that he which is hurt by such reprisals, shall recover the four double of the damages that he hath suffered thereby, and that one man be not beaten or striken for another.

That he that calls a man into law out of his Territorie, or province where he dwelleth, shall enter caution if he obtain not in the sute against him, he shall pay him so much as the Judge of the Court shall condemn him in. And that he who hath given his oath in Judgment, shal pay the whole costs of the sute, but after shall be admitted to prosecute the same if he will, so that he put in sureties to performe it.

That such women as are unindowed shall have the fourth part of their husbands substance, after his death, and in like sort the man of the woman, if the man or woman that surviveth be poor.

That Churches or Religious persons may change grounds one with an other: for that one privileg-

ed

ed perſons right ceaſeth againſt another, that is in like ſort priviledged.

That ſuch changes of Mannors, Lands, Tenements, and Hereditaments as are made by Churchmen to the Prince, be not fained matters, and ſo by the Prince come to other mens hands, who have ſet on the Prince to make this change, and that the change be made to the Princes houſe only, and if the Prince, after convey or confer the ſame upon any private man, it ſhall be lawfull for the Church to reenter upon the ſame again, and to repoſſeſſe it as in her former right.

That in greater Churches, Clerks may pay ſomething for their firſt admittance, but in leſſer Churches it is not lawfull.

That ſuch as build, found, or endow Churches (which muſt goe before the reſt) do the ſame by the authority of the Biſhop; and that ſuch as are called Patrons, may preſent their Clerks unto the Biſhop, but they cannot make or ordain Clerks therein themſelves.

That the ſacred myſteries or miniſteries be not done in private houſes, but be celebrated in publick places, leſt thereby things be done contrary to the Catholick and Apoſtolick faith; unleſs they call to the celebrating of the ſame, ſuch Clerks of whoſe faith and conformitie there is no doubt made, or thoſe who are deputed thereunto by the good will of the Biſhop. But places to pray in, every man may have in his own houſe; if any thing be done to the contrary, the houſe wherin theſe things are done, ſhall be confiſcated, and themſelves ſhall be puniſhed at the diſcretion of the Prince. That

That neither such as be dead, nor the Corse or Funerall of them be injured by the creditors, but that they be buried in peace.

That womens Joyntures be not sold or made away, no not even with their own consent.

In what place, number, forme, manner, and order the Princes Counsell is to sit, and come together.

That he that is convented in judgement, if he willfully absent himselfe, may be condemned after issue is joyned.

That no man build a Chappell or Oratorie in his house, without the leave of the Bishop, and before he consecrate the place by prayer, and set up the Crosse there, and make Procession in the place, and that before he build it, he allot out lands necessaris for the maintenance of the same, and those that shall attend on Gods service in the place; and that Bishops be not non-residents in their Churches.

That all obey the Princes Judges, whether the cause be Civill or Criminall they Judge in; and that the causes be examined before them without respect of persons, and in what sort the Process is to be framed against such as be present, and how against those that be absent.

CAP. III. SECT. VII.

What is the matter of the sixth Collation.

THE sixth Collation sheweth, by what meanes children illegitimate, may be made legitimate that is, either by the Princes dispensation, or by the fathers Testament, or by making

making inſtruments of marriage between the Mother and Father of the Children, ſo that the Mother die not before the perfecting of them, or that ſhe live not riotouſly with other men, and ſo make her ſelf unworthy to be a wife.

That Noble perſonages marrie not without inſtruments of dowrie and ſuch other ſolemnities as are uſuall in this behalfe, that is, that they profeſs the ſame before the Biſhop or miniſter of the place, and three or four witneſſes at the leaſt, and that a remembrance thereof be left in writing, and kept with the Monuments of the Church, but that it ſhall not be needfull for meaner perſons to obſerve the former ſolemnities.

That ſuch as were indebted to the Teſtator, or they to whom the Teſtator was indebted, be not left Tutors or Guardians to their children; that if any ſuch be appointed a Tutor, a Curator be joyned to him, to have an overſight of his dealings: that Tutors or Curators are not bound by law to let out the Minors money, but if they doe, the intereſt ſhall be the Minors, and the Tutor ſhall have every year two moneths to find out ſufficient men, to whom he may let the mony out to hyer, for that it is let out at his perill: that if the Minors ſtate be great that there will be a yearly profit above his finding, the Tutor ſhall lay up the reſidue for a ſtock againſt he comes to age, or buy land therewith, if he can finde out a good bargain, and a ſure title: but if the childes portion be ſmall, ſo that it will not find him, then the Tutor or Curator ſhall diſpoſe of the Minors ſtate, as he would diſpoſe of his own, to which alſo he is bound by oath.

How

How ſuch inſtruments as are inrolled before Judges, concerning matters of borrowing and lending and ſuch like may have credit: how men may ſafely bargain either with writing, or without writing if themſelves be ignorant men, and of the compariſon of Letters, and what credit there is to be given to an inſtrument, when the writings and witneſſes do varie among themſelves.

Of unchaſt People and ſuch as riot againſt nature whoſe puniſhment is death.

Of ſuch as diſpitefully on every light trifle ſweare by God, and * blaſpheme his holy name, againſt whom alſo is provided the ſentence of death.

That the Juſtices of Peace or other Officers to that purpoſe appointed, ſpeedily diſpatch the buſineſſe of thoſe which are of their Juriſdiction: that ſuch as come as ſtrangers and forreiners out of other countries, having no juſt cauſe of their coming, be ſent back again with their ſubſtance, to ſuch places as they came from; but if they be idle vagabonds and rogues, or other like valiant beggers, they either drive them out of the place, or compell them to labour: yet evermore having regard to provide for ſuch as are honeſt, poor, old, ſick or impotent.

* The crime of Blaſphemy was ſo odious to the Emperour, that he thought God would never ſuffer a blaſphemer to go unpuniſhed; and for ſins of this nature ſaith he, the world is viſited with famines, plague and peſtilences: therefore the Law here provideth that a blaſphemer ſhall undergoe *ultimum ſupplicium*. If thou meeteſt (ſaith *Chryſoſtome*) a man blaſpheming βάλε αὐτῷ ἐπὶ ὄψιν, σύντριψον αὐτοῦ τὸ σῶμα, ἀπόδος σου τῇ χειρὶ δίκην τῆς πληγῆς: Strike him a box on the eare, give him a daſh in the mouth and ſanctifie thy hand with a blow. Ἀνδριάντων. al. ſive Hom. 1. ad Pop. Antiochenum. pag. 460. edit. Savil.

That

That Clerks be first convented before their Ordinarie, and that the Ordinarie dot speedily end the matter, that they may not be long absent from their benefices: and that they be not drawn before temporall Judges, unlesse the nature of the cause do so require it, as that it be a meer civile cause, or a criminall cause, belonging wholy to the Temporall court; wherein if a Clerk shall be found guiltie, he shall first be deprived from his ministrie, and then shall be delivered over into the Secular hands: but if the crime be solely Ecclesiasticall, the Bishop alone shall take knowledge thereof, and punish it according as the Canons require.

That whereon dieth without issue leaving behind him brethren of the whole blood, and brethren of the halfe blood; the brethen of the whole blood have the preheminence in the lands and goods of the deceased, before the brethren of the halfe blood, whether they be of the fathers side, or the mothers side.

That no man make Armour, or sell it, without the Princes leave, unlesse they be knives or other such like small weapons.

CAP. III. SECT. VIII.

What is the matter of the seventh Collation.

THat proof by witnesses was devised to that end that the truth should not be concealed, and yet all are not fit to be witnesses, but such alone as are of honest name and fame, and are without

out all ſuſpicion of love, hatred, or corruption; and that their depoſitions be put in writing, that after the witneſſes be publiſhed, and their depoſitions be known, there be no more production of witneſſes, unleſſe the partie ſweare thoſe proofs came a new unto his knowledge.

If Parents give profuſely to one of their children, the other notwithſtanding, ſhall have their lawfull portions, unleſs they be proved unkind towards their parents.

That women albeit they be debtors and creditors, may be Tutors or Curators to their children; and that there is not an oath to be exacted of them that they will not marry again, ſo that they renounce their priviledge granted unto them, *per Sinatus conſultum Vellean*; and performe all other things, as other Tutors do.

That Governours of Provinces are not to leave their charges, before they are called from thence by the prince, otherwiſe they incurre the danger of Treaſon.

That womens dowries have a priviledge before all other kinds of debt; that what dowrie a woman had in her firſt marriage, ſhe ſhall have the ſame in her ſecond marriage, neither ſhall it be lawfull for her Father to diminiſh it, if it return again into his hand.

That a man ſhall not have the property of his wives dowrie, neither a woman the propertie of that which is given her before marriage, but the property of either of them ſhall come unto their children, yea though they marry not again.

CAP.

CAP. III. SECT. IX.

What is compriſed in the eighth Collation.

WIlls or Teſtaments made in the behoof of children, ſtand good, however imperfect otherwiſe they are, but they are not available for ſtrangers, (but ſtrangers are they which are not children) neither mattereth it whether the Will or Teſtament be writ by the Fathers hand only, or by ſome other body by his appointment; and as the Father divideth the goods among the children, ſo they are to have their parts. *De Teſtament. imperfect. § Nos igitur.*

Of Heretieks, and that ſuch are Hereticks, which do refuſe to receive the Communion at the Miniſters hand, in the Catholick Church: That Hereticks are not to be admitted to roomes and places of honour, and that women Heretieks may not have ſuch priviledges as other women have in their Dowries.

That is called mariners uſurie, that is wont to be lent to Mariners, or Merchant-men, eſpecially ſuch as trade by ſea; which kind of lending, the Law calleth paſſage-money, in which kind of uſurie, a man cannot go beyond the 100. part.

That Churches enjoy a hundred years preſcription.

That ſuch things that are litigious, during the controverſie, are not to be ſold away. A litigious thing, is that which is in ſute between the plaintife and defendant.

That

That while the ſute dependeth, there be no letters or Edict procured from the Prince concerning the cauſe in queſtion, but that the cauſe be decided according to the generall Lawes in uſe.

That in divorces, the children be brought up with the innocent party, but at the charges of the nocent: and that divorces be not admitted, but upon cauſes in Law expreſſed.

That no woman whoſe husband is in warfare, or otherwiſe abſent, ſhall marry again, before ſhe have certain intelligence of the death of her former husband either from the Captain under whom he ſerved, or from the Governour of the place where he dyed; if any woman marry again without ſuch certain intelligence, how long ſo ever otherwiſe her husband be abſent from her, both ſhe and he who marryed her ſhall be puniſhed as adulterers; and if her former husband after ſuch marriage, return back again, ſhe ſhall return again to her former husband, if he will receive her, otherwiſe ſhe ſhall live apart from them both.

De hæred abinteſtat. ſi quis autem.

If any man beat his wife for any other cauſe, than for which he may be juſtly ſevered or divorced from her, he ſhall for ſuch injurie be puniſhed.

If any man conceive a jealouſie againſt his wife, as that ſhe uſeth any other man more familiarly than is meet ſhe ſhould, let him three ſeverall times admoniſh him thereof, before three honeſt and ſubſtantiall men; and if after ſuch admonition he be found to commune with her, let him be accuſed of adultery before ſuch a Judge, who hath authority to correct ſuch offences.

CAP.

CAP. III. SECT. X.

What is the matter of the ninth Collation.

THE ninth and laſt Collation conteineth matter of ſucceſſion in goods, that as long as there be any Deſcendent, either Male or Female, ſo long neither any Aſcendent, or any Collaterall can ſucceed, and that if there be no Deſcendent, then the Aſcendent be preferred before the Collateral, unleſs they be brethren or ſiſters of the whole blood, who are to ſucceed together with the Aſcendent; but in Aſcendents, thoſe are firſt called which are in the next degree to the deceaſed, then after thoſe which are in a more remote degree: that in Collaterals all be equally admitted, which are in the ſame degree, and of the ſame Parents, whether they be male or female.

That the lands of any Church, Hoſpitall, or other like Religious place, be not ſold, alienéd, or changed, unleſſe it be to the Princes houſe, or to, or with an other like Religious place, and that in equall goodneſs and quantitie, or that it be for the redemption of Priſoners: and that they be not let out to any private man more than for 30 years, or 3. lives, unleſſe either the houſes be ſo ruinated, that they cannot be repaired without great charges of the Church, or other Religious houſes, or that it be overcharged with any debt or duties belonging to the Exchequer, and thereby there cometh ſmall revenue to the Church, or Religious

place

place thereout; in every of which cases it is lawfull to let out the same for ever, reserving a yearly competent rent, and other acknowledgement of other soveraignty therein.

That the holy vessels of the Church be not sold away, unless it be for the ransoming of Prisoners, or that the Church be in debt, in which case, if they have more holy vessels than are necessary for the service of the Church, they may sell those which are superfluous to any other Church that needeth them, or otherwise dispose of them at their pleasure for the benefit of the Church, or other holy place whose they are.

Where Usurie in processe of time doth double the principall, there Usurie for the time to come doth cease, and those particular payments which afterwards doe follow are reckoned in the principall.

What kinde of men are to be chosen Bishops, such as are sound in faith, of honest life and conversation, and are learned, that such as chuse them, swear before the choyce, they shall neither chuse any for any reward, promise, friendship, or any other sinister cause whatsoever, but for his worthinesse and good parts onely.

That none be ordeined by Symonie, and if there be, that both the giver, taker, and mediator thereof be punished according to the Ecclesiasticall Lawes, and they all made unworthy to hold or enjoy any Ecclesiasticall living hereafter.

That if any at the time of any Bishops election, object any thing against him that is to be elected,

the

the election be ſtaid, till proofe be made of that which is objected by the adverſarie againſt the partie elected, ſo that he prove the ſame within three Moneths; and if any proceeding be to the conſecration of the ſame Biſhop in the mean time, it is void.

That the Biſhop after he is ordeined, may without any danger of Law, give or conſecrate his goods to the uſe of the Church, where he is made Biſhop, and that he may give ſuch fees as are due to the electors by law or cuſtome.

That Clerks be not compelled to undergoe perſonall functions, and ſervices of the commonwealth, and that they buſie not themſelves in ſecular affaires, and ſo thereby be drawn from their ſpirituall function.

That Biſhops for no matter or cauſe be drawn before a temporall Judge, without the Kings ſpeciall commandement, and if any Judge preſume to call any without ſuch ſpeciall warrant, the ſame is to looſe his office, and to be baniſhed therefore.

That no Biſhop abſent himſelf from his Dioces without urgent occaſion, or that he be ſent for by the Prince, and if any doe abſent himſelf above one year, that he ſhall lack the profit of his Biſhoprick, and be depoſed from the ſame, if he return not again within a competent time appointed for the ſame.

What manner of men are to be made Clerks, ſuch as are learned, and are of good Religion, of honeſt life and converſation, and are free from ſuſpition of incontinencie; that no Miniſter be leſs than 35 yeare

of age, and that no Deacon or Subdeacon under 25. that all Clerks and Miniſters be ordeined freely.

If any build a Church, and indow the ſame, that he may preſent a Clerk thereto, ſo that he be worthy to be admitted thereto: but if he preſent an unworthy man, then it apperteineth to the Biſhop to place a worthy man therein.

If any Clerke be convicted to have ſworne falſely, hee is to be deprived of his office, and further to be puniſhed at the diſcretion of the Biſhop.

That Clerks be convented before their own Biſhops, and if the parties litigant ſtand to the Biſhops order, the Civile Judge ſhall put it in execution: but if they agree not upon the judgement, then the Civile Judge is to examine it, and either to confirme or infirme the Biſhops order, and if he confirme it, then the order to ſtand, and if not, then the party grieved to appeal.

If the cauſe be criminall, and the Biſhop finde the party guilty, then the Biſhop is to degrade him, and after to give him over to the ſecular power: the like courſe is to be held if the cauſe be firſt examined before the temporall Judge, and the party found guilty, for then hee ſhall be ſent to the Biſhop to be deprived, and after again ſhall he delivered to the ſecular powers to be puniſhed.

That Biſhops be convented before their Metropolitans.

Si vero etiam Litaniam concuſſerit

That ſuch as in Service time do abuſe, or injure the Biſhop, or any Clerk in the Church, being at divine ſervice, be whipt, and ſent into baniſhment:

But

But if they trouble thereby the divine Service it selfe, they are to dye the death for the same.

That Lay men are not to say or celebrate divine service, without the presence of the Minister, and other Clerks thereto required.

That such as goe to Law, swear in the beginning of the suit, that they have neither promised, or will give ought to the Judge, and that usuall fees be taken by the Advocates, Counsellours, Procters, or Attournies, and if any man take more than his ordinary fees, he shall be put from his place of practise, and forfeit the four double of that he hath taken.

That the 4. generall Councels be holden as a Law, and that which is decreed in them.

That the Bishop of Rome hath the first place of sitting in all assemblies, and then the Bishop of Constantinople.

That all Clergy mens possessions be discharged from all ordinary and extraordinary payments, saving from the repairing of Bridges and High wayes, where the said possessions doe lye.

That no man build a Church, or holy place, without the leave of the Bishop, and before the Bishop there say Service, and set up the sign of the Crosse.

That no man in his own house suffer Service to be said, but by a Minister allowed by the Bishop, under pain of confiscating of the house, if it be the Lord of the house that presumeth to do it, or banishment, if it be done by the tenant.

If any bequeath any thing to God, it is to be payd to the Church where the Testator dwelled.

capitale periculum sustinebit. Le Santissim. Episcop. & Deo. § Si quis cum sacro minist.

If any deviſe by his laſt Will a Chappell, or Hoſpitall to be made, the Biſhop is to compell the Executors to performe it within five years after the deceaſe of the Teſtator; and if the Teſtator name any governour, or poor thereto, they are to be admitted; unleſſe the Biſhop ſhall finde them unfit for the room.

That the Biſhop ſee ſuch Legacies performed, as either are given for the redemption of priſoners, or for other godly uſes.

That Maſters of Hoſpitals make an account of their charge, in ſuch ſort as Tutors doe.

That ſuch as luſt againſt nature, and ſo become brutiſh, receive condigne puniſhment worthy their wickednesſe.

That ſuch as make Eunuches, themſelves be made Eunuches, and if they eſcape alive, their goods to be forfeited to the Exchequer, and themſelves be impriſoned all the dayes of their life.

Such as by force ſteal away women; themſelves, and ſuch as are their abbetters and helpers, are to dye therefore, and that it ſhall not be lawfull for her that is carried away, to marry to him that doth carrie her away: and that if her father do give his conſent to ſuch marriage, he is to be baniſhed: but if ſhe marry him without her fathers conſent, then is ſhee not to take benefit by her fathers Will, or any other thing that is her fathers.

Theſe, and ſundry other matters of great importance and neceſſary for the well governing of a common-wealth, are conteined in the Authentick: which I paſſe over with drie foot; not becauſe they are

are not neceſſary to be known, but becauſe I would not cloy the Reader even with thoſe things which are good.

All theſe workes are the labour of *Juſtinian*, as either gathered together by him out of the ancient Lawyers books, and ſuch Emperours decrees, as went before him, or elſe were decreed and ordeined by himſelfe, as matter and occaſion offered it ſelf, and the youngeſt of them is neer eleven hundred yeares of age, that is, within 500. years after Chriſt, or not much otherwiſe.

CHAP. IV.

SECT. I.

That the laſt Tome of the Civile Law is the Feudes, and what they are.

THE laſt Tome of the Civile Law is the *Feudes*, that is, *the Books of Cuſtomes and Service, that the ſubject or vaſſall doth to his Prince, or Lord, for* ſuch *lands* or *fees* as he *holdeth* of him.

This piece of the Law, although it was not much uſe in the old Emperours dayes, yet *Juſtinian* himſelf ſeemeth to acknowledge them in his Novell

constitutions, calling them στρατιωτικὰ and those which are more carefull to seek out the beginning of them, bring them, some from the ancient Clienteles or retinews the ancient Romans before Christs time had, as *Budeus* doth; some other from *Alexander Severus* time, who, as *Lampridius* in the life of *Alexander* saith, gave such lands as he wonne out of the Enemies hands to his lords Marchers, and his Souldiers, that they should be theirs, and their heires for ever, so they would be Souldiers; neither should they come at any time to the hands of any private man, saying, they would more lustily serve, if they fought for their owne land.

which opinion cometh next to the ancient border-grounds of the Romans, whereof there is a title in the eleventh Book of the Code, *De fundis Limitrophis*, that is of Border ground: Others referre it over to *Constantines* time the great who enacted for the benefit of his Souldiers, that such Lordships and lands as before time they had their wages out of, should pass over unto their heirs and be appointed to their familie, and stock, so that they found and mainteined continually a certaine number of Souldiers.

See for the originall of the Feuds *Cujacius*, but especially Sir *Henry Spelmans* Glossarie.

From whensoever it descended, this is certain that it came very late to be a particular volume of the law it self: The compilers or gatherers together thereof, were *Obertus de Horto*, and *Giraldus Compagist*, two Senators of Millain, who partly out of the Civile Law, and partly out of the Customes of Millain drew the same, but without forme or order.

The

The word it self is a barbarous word, but had its originall; notwithstanding, as *Isidore* saith, from the word *Fœdus*, being a good Latin word, and so is to be interpreted *tanquam feodum*, that is, as a thing covenanted between two: Others deduce it from the word *Fides*, as it were in Latine *Fideum*, and by a more pleasant pronunciation *Feudum*, whereupon such as are Feudataries to other, are called in Latin *Fidelet*, because they owe faith and allegeance to such whose Feudataries they are, who in the *Lombard* tongue are called Vassals. Besides, Fealtie, which some call *Hominium*, by the Feudists is termed Homage: for the nature of a feude is this, that it draweth with it faith and homage: so that such as are Feudataries, or fee-men, profess themselves to owe faith to such, to whom they are in fee, and that they are his men; insomuch, as when a fee-man dieth, his heire doth make faith, and doth his homage to the Lord, as is well seen both in the Lords Spirituall and Temporall of this land, who both in their creation, and also in their succession one after another sweare an oath, and do their homage to their Soveraign, and do pay other duties which are Symbols and signes of their subjection to their Soveraign: And for others that are under the degree of Barons, and yet are fee men unto the King, and so do not manuell obedience unto his Majestie, they pay yearly something in respect of their homage, according to the quantitie or qualitie of the fee or tenure they hold of the Prince.

A Feude, in English may be called a Tenure, which caused *Littleton*, when he treated of Feudes, so far forth as they are here in use in England (such as are all those which are called in Latin *Feuda militaria, and Feuda scutiferorum*, called by *Justinian* συντέλειαι, which are by the Lawes of the land, tearmed by the names of Knights-services, and Escuage) to call them by the name of Tenures.

A Feude is a grant of lands, honours, or fees made either to a man at the will of the Lord, or Soveraigne, or for the Feudataries own life, or to him, or his heires for ever, under condition, that he and his heires in case where the Feude is perpetuall, do acknowledge the giver and his heires to be their Lord and Soveraigne, and shall bear faith and alleageance unto him and his, for the said Tenure, and shall do such service to him, and his for the same, as is between them covenanted, or is proper to the nature of a Feude.

CAP. IV. SECT. II.

That Feuds are either Temporall or Perpetuall and how.

OF *Feudes*, some are *Temporall*, some other are *Perpetuall*.

Temporall Feuds are those that are given, either for terme of a mans life, or for years, or at the will of the Lord, for some service done, or to be done, such as are Annuities given to Lawyers for counsell, pensions

penſions given to Phyſitians for their advice, Stipends to any Teacher of Arts and Sciences, Fees for keeping of Towers and Caſtles; called by Fendiſts *Caſtalia*, and is by *Littleton* called Caſtle-ward, although by him it is taken for a ſtate of inheritance.

Perpetuall Feuds, are rights which a man hath by grant from the Soveraign, or chief Lord of the ſoyle or territorie, to have, hold, uſe, occupie, and injoy honours, mannors, lands, tenements, or hereditaments, to him and his heires for ever, upon condition that the ſaid vaſſall or partie, his heires and ſucceſſors, do homage and fealty to his Lord, his heires and ſucceſſors, for ſuch honours, lands or hereditaments, and do him either ſervice in war, according as it is covenanted between the Lord and his vaſſall, or ſuch other ſervice as the nature of his tenure doth require, or if he faile therein, he ſhall either finde ſome other in his room to doe the ſame, or elſe pay a certaine ſumme of money in lieu thereof.

Although this Tenure by the firſt creation thereof be perpetuall, yet that the ſoveraignty thereof ſhould not ſtill remain unprofitable to the firſt Lord, the whole benefit thereof going continually to the vaſſall or tenant, it is provided, that the Soveraigne or chief Lord the firſt year, the heire or ſucceſſour of the vaſſall comes unto his land, ſhall have the whole revenue of his livelihood for that year, or a certain ſumme of money in token of the return thereof unto the Lord, and the redemption thereof made again by the tenant, which by the law of the Novels is called ἀνακτησις, and is well nigh the ſame

same that we call livery, which every heire that holdeth in Knights service, sueth out before he take possession of his land, as heire to his Ancestours.

This *Tenure* is gotten either by *Investiture*, or by *Succession*.

Investiture what it is.

Investiture is the same that we call *creation*, and *is the Primier grant* of a Feude, or Tenure to any, with all rights and solemnities thereunto belonging, wherein the homager, or feodatarie for the most part upon his knees promiseth faith and alleageance under solemne oath unto his Lord and his successours.

What is Succession in the Feuds.

Succession is, whereby the *eldest sonne succeedeth the father* in his inheritance, and if he faile and have no issue, then the next brother and so in order successively; and if there be no son, then the next heire male; and if there be no heire male, then the land escheats unto the Lord. For the *Lumbards*, from whom the Feuds first came, or at the least were chiefly derived from them, directing all their policie as the *Lacedemoni* did to matters of warre, had no feminine Feuds among them, but after by processe of time, there were created as well Feminine Feudes as Masculine Feudes, in so much, as where there was no issue male to put them from it, women did succeed in the inheritance.

CAP.

CAP. IV. SECT. III.

Of Feudes Regall and not Regall, Leige and not Leige, and how Feuds may be lost.

OF *Feuds*, some are *Regall*, some *not Regall*: *Regall* are those which are *given by the Prince* only, and cannot be given by any inferiour: Of these, some are *Ecclesiasticall*, as Archbishopricks, Bishopricks and such like: others are *Civill* or Temporall, as Dukedomes, Earledomes, Viscounts, and Lords, who by that are distinguished from the rest of the people, that they have the conducting of the Princes Armie at home and abroad, if they be thereto appointed, and have right of Peers in making of Lawes, in matters of tryall, and such other like businesses.

Not Regall are those which hold not immediatly of the Prince, but are holden of such Ecclesiasticall or Civill States which have had their Honors immediately from the Prince.

Besides of Feuds, some are *Leige*, others *not Leige*; Leige Feuds, are they in the which the vassall or feudatorie promiseth absolute fealtie or faith to his Lord, against all men without exception of the King himselfe, or any other more ancient Lord to whom besides he oweth alleagance or service. Of this sort there is none in this Realm of England, but such as are made to the King himself, as appeareth by *Littleton* in the title of Homage, wherein

Salve le Foy que je doy a nostre Signeur le Roy. Littleton. tit. Homage.

wherein is specially excepted the faith which the Homager oweth to his Lord the King.

Feuds *not Leige*, are such wherein Homage is done with speciall reservation of his faith and alleageance to his Prince and Soveraigne.

Of such as are Vassals or Leige men, some are called *Valvasores majores*; others *Valvasores minores*. *Valvasores majores* are such as hold great places of the state under the Emperour or King, (as the degrees before named, and are called *Peers of the Land*) who only gives Nobilitie. *Valvasores minores*, are those which are no Peers of the Land, and yet have a preheminence above the people, and are as it were in a middle Region between the people and the Nobilitie, such as are *Knights*, *Squires*, and *Gentlemen*.

Valvasors.

The Feuds are lost by sundry wayes, by default of issue of him to whom it was first given, which they call *Apertura feodi*; by surrender thereof, which by them is termed *Refutatio feodi*; by forfeiture, and that was in two sorts, either by not doing the service that his tenure did require, or by committing some villainous act against his Lord, as in conspiring his Soveraignes death, defiling his bed, or deflowring his daughter, or some other like act treacherous to his Lord, and unworthy of himselfe.

CAP.

CHAP. V.

SECT. I.

What the Canon Law *is in generall: What the* Decrees *are, and of how many parts.*

AND ſo much of the Civile Law, and the the Bookes thereunto pertaining. Now it followeth that I do in like order ſpeak of the *Canon Law*, which is more hardly thought upon among the people, for that the ſubject thereof, in many points, hath many groſſe and ſuperſtitious matters uſed in the time of Papiſtrie, as of the Maſſe, and ſuch other like trumperie; and yet there are in it beſide, many things of great wiſdome, and even thoſe matters of ſuperſtition themſelves, being in a generalitie, well applyed to the true ſervice of God may have a good uſe and underſtanding.

The *Canon Law*, hath his name of the Greek word *Canon*, which in Engliſh is a *Rule*, becauſe it leads a man ſtraight, neither draws him on the one ſide or the other, but rather correcteth that which is out of Levell and Line. What is the Canon Law.

The *Canon Law* conſiſteth partly of certaine *Rules*, taken out of the holy *Scripture*, partly of the *writings* of the *ancient Fathers* of the Church, partly of the *ordinances* of generall and provinciall *Councels*, partly of the *decrees* of the *Popes* of former ages. Of the Canon law there are two principall parts, the *Decrees* and the *Decretals*. The *Decrees*

What is the antiquity of Decrees and who were the Authors that compiled them

crees are *Eccleſiaſticall conſtitutions, made by the Pope and Cardinals, at no manis ſuit*, and are either Rules taken out of the Scripture, or Sentences, out of the ancient Fathers, or Decrees of Councels. The Decrees were firſt gathered together by *Ivo*, Bi of *Carnat*, who lived in the time of *Urban* the 2: about the year of our Lord God 1114. but afterward poliſhed and perfected by *Gratian*, a Monk of the Order of S. *Bennet*, in the yeare * 1149. and allowed by *Eugenius* the Pope, whoſe Confeſſor he was, to be read in Schooles, and to be alleadged for Law.

*Trithem. in his ſecond Book *Le viris illuſt.* ſaith that *Gratian* wrote this Work at *Bononia*, in the Monaſterie of S. *Felix An.* 1127. Others ſay it was done in the yeare 1151. *Bellarmine* to reconcile the difference, ſaith that *Gratian* might begin the work according to the firſt account, and finiſh it according to the ſecond.

Of all the ſeverall Volumes of the Canon Law, the Decrees are the ancienteſts, as having their beginning from the time of *Conſtantine* the great, the firſt Chriſtian Emperour of *Rome*, who firſt gave leave to the Chriſtians freely to aſſemble themſelves together, and to make wholeſome lawes for the well Government of the Church. The *Decrees* are divided into *three parts*, whereof the firſt teacheth of the *origen* and *beginning* of the *Canon Law*, and deſcribeth and ſetteth out the *rights, dignities, degrees* of *Eccleſiaſticall perſons*, and the manner of their *elections, ordinations*, and *offices*, and ſtandeth of *one hundred* and *one diſtinctions*.

The *ſecond part* ſetteth out the *cauſes, queſtions* and *anſwers* of this *Law*, which are in number 36. and are full of great varietie, wiſdome, and delight.

The *third* and laſt part, containeth matter of

conſecration

conſecration of all *ſacred things*, as of Churches, Bread and Wine in the Sacrament, what dayes and Feaſts the primitive Church uſed for the receiving thereof, of miniſtring of the Sacraments in Baptiſme, and the uſe of impoſition of hands, all which is ſet out under five diſtinctions.

CAP. V. SECT II.

What the Decretals *are, and how many parts they comprehend.*

THE *Decretals* are *Canonicall Epiſtles* written by the *Pope alone*, or by the *Pope and Cardinalls*, at the *inſtance* or *ſuit* of ſome one or more for the ordering and determining of ſome matter in controverſie, and have the authority of a law in themſelves.

Of the Decretals there be three Volumes, according to the number of the Authors that did deviſe and publiſhed them.

The *firſt Volume* of the Decretals was gathered together by *Raymundus Barcinius*, Chaplain to *Gregory* the ninth, at his the ſaid *Gregories* commandment, about the yeare 1231. and publiſhed by him to be read in Schools and uſed for Law in all Eccleſiaſticall Courts. The *ſecond* is the worke of *Boniface* the eighth. methoded by him about the yeare 1298, by which, as he added ſomething to the ordinance of his Predeceſſors, ſo he took away many things that were ſuperfluous and contrary to themſelves, and reteined the reſt. The *third* Volume of the

the Decretals, are called the *Clementines*, because they were made by Pope *Clement* the fifth of that name, and published by him in the Councell of *Vienna* about the year of grace 1308.

To these may be added the *Extravagants* of *John* the 22. and some other Bishops of *Rome*, whose authors are not known, and are as *Novell constitutions* unto the rest.

CAP. V. SECT. III.

What is contained in the first book of the Decretals.

EVery of the former Volumes of the Decretals are divided into five Books and containe, in a manner, one and the same titles whereof the first in every of them, is the title of the blessed Trinitie, and of the Catholick faith, wherein is set down by every of them a particular belief, divers in words, but all one in substance, with the ancient Symbols, or beliefe of the old Orthodox, or Catholick Church.

Secondly there cometh in place the treatie of Rescripts, Constitutions and Customes, and the authority of them, and when they are to be taken for Law: after followeth the meanes whereby the greater Governours of the Church, as namely, Archbishops, Bishops and such like, come unto their room; which was in two sorts according as the parties place or degree was when he was called unto

to the room, as if he were under the degree of a Bishop, and was called to be a Bishop, or being a Bishop was called to be an Archbishop, or to be the Pope himself, he was thereto to be elected by the Dean and Chapter of the Church where he was to be Bishop; or by the Colledge of the Cardinals in the Popedome; but if he were already a Bishop or an Archbishop, and were to be preferred unto any other Bishoprick or Archbishoprick, then was he to be required by the Church, he was desired unto, and not elected; which in the Law was called *Postulation*; after *Postulation* followed translation by the superiour, to the See to which he was postulated or required: after Election followed Confirmation and Consecration of him that was elected, which both were to be done in a time limited by the Canons, otherwise the party elected lost his right therein.

Bishops and other beneficed men, sundry times upon sundry occasions resign their benefices, and therefore is set down what a renunciation or resignation is, who is to renounce, and into whose hands, and upon what causes a man may renounce his benefice or Bishoprick: and because under Ministers are often times negligent in their Cure, that the people in the mean time may not be defrauded in Divine Service, the Sacraments and the food of the Word of God, it is provided, that the Bishop shall supply the negligence of such Ministers as are underneath him in his Jurisdiction: besides because holy orders are not to be given but by imposition of hands, with prayer and fasting,

Foure fit times in the year are limited for the same, where also is set down how they are to be qualified who are to be ordered, what triall or examination is to be had of them, what age they are to be of, and what gifts of body or minde they are to be endowed withall: what Sacrament

* The old Romans instituted three yearly Solemnities in honour of

their Gods for the Fruits of the Earth: These also the Romish Church observed having first moderated their superstition, and directed them to a more sacred end. To the three, one of the Popes (as they say) added the fourth, with a respect had to those of the Jewes, in *Zech.* 8. 19. and so they were called *Jejunia quatuor temporum.* That institution, as the first had many other causes, for which see the Sermons of *Leo* and *Durandi Rationale*, but in after times at these Solemnities, especiall regard was had to the Ordination of Priests and Deacons, which had been formerly performed onely once a yeare, in the Moneth of *December*, (as *Anastasius* hath observed.) It seemeth therefore to be otherwise then as *Bellarmine* hath disputed, whose opinion it is, that these Feasts may be fetch't from the Apostles times, and that one of these foure is mentioned by S. *Luke* in S. Pauls voyage to Rome, *Act.* 27. though the Syriack Paraphrast in that place plainely setteth down for the Greek [illegible] calling it, a Fast of the Jewes, not Christians. But the great and learned Cardinall in his devotion to sacred Orders, took any opportunity to make such Solemnities in every circumstance Apostolicall.

In what manner, and with how much care and Christianity these Fasts have been heretofore observed, it may be noted out of the second Councell of *Millaine. Tit.* 3. *Decr.* 22. where the Bishop is to command that upon the Sunday before these Fasts, *Parochi non solum solemne illud jejunium denuncient, verum etiam in suis unusquisque eorum Parochiali Ecclesia supplicationes Litanias que pie ac religiose vel intus ibi vel prosequente fidelium multitudine foris, Ecclesiam, sicut moris est, circuat, ut Dei ope implorata tum Episcopus in eorum delectum quibus ordines conferret Spiritus Sancti lumine illustretur; tum illi qui ad eos conferuntur in vitæ sanctitate, doctrina, religione que virtutibus proficiant.*

In the fourth Councell of *Millaine* is set down out of *Leo*, the

fol.

form of bidding these Fasts in the Church; *Quod sacrorum temporum ratio fert*, and afterwards *Quarta igitur, sexta feria & Sabbato jejunemus, frequentes in Cathedrali Parochialique Ecclesia ad litanias Orationesque convenjamus, & quo sacris illis Feriis à cibo abstinentiores esse studemus, eo abundantiori eleemosynarum liberalitate erga Christi pauperes affectiores simus: tam Sabbato sub vesperem orationem Parochialem curiosum celebremus, quæ & pro spe felicitatis æternæ ad quam per illum currimus, & pro sacra ordinatione, quam eo die à Reverendissimo Episcopo habere solenne est, & pro iis commodis quæ singulorum annorum revolutione consequimur Deo omnipotenti gratias agamus &c. Tom. Concil. 4. Edit. Bin.*

These four Fasts at this present day are observed in our own Church, and are known unto us by the name of Emberweeks. And (so I find it in *Thomas Becon*) by opinion of much people, these dayes being called Imber-dayes, because that our elder Fathers would on these dayes eat no bread, but Cakes made under ashes, so that by the eating of them, they reduced into their mindes that they were but ashes, and so should turne againe, and wist not how soon, &c. And that these Imber-dayes were duely and devoutly observed by our Ancestors, we may be perswaded out of the Lawes of King *Canute*: where it is said cap. 16. ⁊ þ man ælc be bodam fæsten healde sy hit ymbren fæsten sy hit lengten fæsten sy hit ellef oþre fæsten mid ealra geornfulnesse, That every man observe the Fasts which are commanded, withall earnest care, whether it be the Imber Fast or the Lent Fast, or any other Fast: And Chap. the 17. ⁊ beo þam halgan tidum eal sprec hit sie callum cristenum mannum sy⁊: ⁊ fram gemene ⁊ æle pæd to ut⁊emest where the Law saith, That it is meet and right, that at these Fasts, all malice being laid aside, all men should be at peace. And concerning the outward observance in the 43 Chap. it is said: yfel hit⁊ þ man fæsten tid ær mæle ete ⁊ gyt wiþre þ mannis flæsc mete hine sylene ær yle. Evill is it is that upon a Fast-day a man should eat any thing till meal time, and it is much worse if he should eat flesh meat. This was the Religion of our Ancestours; and if ignorance could admit of so much devotion, how much more would be expected from the knowing times?

may be reiterated what not: that ministers sons are not to succeed their Fathers in those benefices wherein their Fathers immediately before were Pastors or Governours, lest happily thereby might be claimed a succession or inheritance in the same: that no bondmen or accountants, men distorted or deformed in body, bigamists or twice married men be admitted to holy orders.

Of wandring Clerks, and how they are not to be admitted to minister in an other Dioceese, than where they are ordered without the Dimissorie Letters of the Bishop, under whom they were ordered. Of Archdeacons, Archpriests, Sacrists, Vicars what they are, and wherein their particular offices do consist. Of the office of Judges in generall, and their power, whether they be Delegates, Legats *a latere*, or Judges ordinarie. Of difference in Jurisdiction between Ministers and Ministers, & what obedience the inferiour Ministers are to yeild unto their superiours. Of Truce and Peace which Ecclesiastical Judges are to procure; that truces be kept from Saturday in the Evening untill Munday in the Morning, and that there be no fighting from the first day of Advent, untill the eigth day after Twelfe tide, and that war do likewise cease from the beginning of Lent, untill the eigth day after Easter, under pain of Excommunication against him that presumeth to do the contrarie, and that in time of warre, neither Priests, Clerks, Merchant-men, country men, either going to the field, or coming from the field, or being in the field, or the cattell with which they plough, or the seed with which they

they sow, be hurt or violated. Judges, before men enter into the dangerous events of the Law, are to perswade the parties litigant by private covenants and agreements to compound the controversie between them, wherein if they pervaile not, then the parties are to provide themselves of Advocates, Proctors, or Syndecks according as they are private men, or bodies politick to furnish their cause, and direct them in proceeding.

If any Church hath been hurt in any contract of bargain, or sale, or in demising of any Lease, or by the Proctors negligence, it is to be restored again into her former state, to alleadge and plead that for it selfe which is agreeable to Law and conscience. The like grace is to be granted to all other Litigants whatsoever, who have by feare or violence, or any other like unjust cause, been hindered from the prosecution of their right.

If any seeing a sute like to be commenced against him, do either appeale before he be served with Writ, or alienate away the thing whereupon the sute was like to grow, he is to be compelled to hold plea of the same cause, before the Judge from whom he did appeale, and to answer his adversarie, as though still he were owner of the thing he did in policie sell or alienate away.

Many times things which otherwise can have no speedy end by Law, are compounded by Arbitrement. Arbitrators ought to be odde in number, that if they disagree, that which is concluded by the greater part may pervaile. An arbitrement is a power given by the parties litigant to some, to hear *Arbitrement.*

hear and determine some matter in suit, between them, and to pronounce upon the same, to which they are to bind themselves under a penalty to stand.

CAP. V. SECT. IV.

What is conteined in the second Book of the Decretals.

THE first Book having set out the first object of the Law, which standeth in the persons who make up the Judgement, as in the person of the Judge himself, the Advocates, Proctors and Clients, there followeth in the second Book, the second object of the same, which is the Judgements themselves, which are to be commenced by a Citation, and that in a competent Court fit for the same, by a Libell offered upon the Court by the plaintife to the Judge, which is to contain the summe of that which is required in Judgement, whereto if the defendant doe again recony the the plaintife, he is to answer, albeit the defendant be not of that Jurisdiction; the Libell being admitted, the defendant is to joyn issue, and yet before either of them can any further into the cause, that there may be a true and sincere dealing in the same, and that all suggestion of malitious dealing therein may be taken away, each of them are to take an oath, the plaintife, that he doth not of any malice prosecute his suite against the Defendant, or the Defendant that

malice maintain the ſuit againſt the Plaintife, but that they verily believe their cauſe is good, and that they hope they ſhall be able to prove, the one his libell, the other his exceptions, if he ſhall put in any into the Court. The cauſe being begun, delayes are often granted, if either there come any holiday between, or any other the like juſt cauſe be offered as for producing of witneſſes and ſuch like: if there be no juſt cauſe of delay, then the Judge is to goe on in the due courſe of Law, (provided always that more be not demanded by the plaintife than is due) and that the cauſe poſſeſſory be handled before the petitorie, and that hee that is ſpoyled bee firſt and before all things reſtored to that thing or place whereof he was ſpoyled, or from which hee was put; yea, though he have nothing elſe to alledge for himſelf, beſides the bare ſpoliation it ſelf. If the one ſide or other wilfully or deceitfully delude judgement, the Judge is to put the other in poſſeſſion of that which is in demand, or at the leaſt to ſequeſter the fruits and poſſeſſions of that which is in controverſie but if both parties appear and joyne iſſue affirmatively, then is it but a queſtion of Law, and not of fact, neither doth there remain ought elſe to be done by the Judge, but that he give ſentence againſt him that hath confeſſed it, and put his ſentence in execution. But if iſſue be joyned negatively, then is the plaintife to prove his Libell, ſo farre as it conſiſts in fact, but witneſſes which are to be compelled by Law if they will not come, or appear voluntarily, by publick and private inſtruments, by preſumptions, by conjectures, by

oath, which being done, the Defendant in like sort is to be admitted to prove his exceptions and cleer his prelcription if he be able so alledge any, in which he is Plaintife, neither is he bound thereto before the Plaintife have perfected and proved his own right.

After proofs are brought on either side, and the same throughly disputed on by the Advocates, the Judge is to give sentence, which he is to frame according to the Libell and proofs formerly deduced in the cause. The sentence being given, Executions are to be awarded, unlesse there be an appeal made from it within ten dayes by the Law, (but fifteen dayes by the Statute of this Land) from the time the party against whom sentence was given, had knowledge thereof, or unlesse it be appealed incontinently at the acts, and in writing, before a publick Notary, or at the least the party against whom the sentence proceeded, with due time, take their journey toward the higher Judge to prosecute the same, by whom the former sentence is either confirmed or infirmed in the second instance.

CAP. V. SECT. V.

What is the subject of the third book of the Decretals.

THE third book, contemneth such Civile matters and causes as are lyable to the Ecclesiastical Courts, as the honest life or conversation of Clerkes,

Clerkes, and their comely comportment in all their demeanour, with what women they are to dob bit, and dwell with, whereby they may be free from all suspition of ill life, and with whom not, which of them may bee married by the law of the Canons, and which not, in what cases they may be allowed to be non-resident, and in what not, and how such as are non residents may be called home unto their care, and if they return not upon processe sent out against them, how they are to bee punished, namely by deprivation or sequestration of the fruits and commodities of their benefice.

Prebends and dignities are preferments for Clerkes, but not for such as are idle or absent from the same without just cause, but if any Clerke or Minister be sick, and his disease be curable, he is to receive the benefit of his prebend or dignity in his absence, as though he were present, but if it be contagious, or uncurable, then he is to be put from the exercise of his office, and a helper, or coadjutor to be joyned unto him, and they both to be maintained of his stipend.

Prebends or dignities are to be got by institution, which is to be given by the Bishop, or his Chancellour, or such other as have Episcopall jurisdiction, without which, neither any benefice is lawfully gotten, nor can lawfully be received. Benefices not voyde, ought neither to be granted, neither to be promised, but such as are voyd ought to be granted within six months after knowledge of the voydance thereof, otherwise the grant of them devolveth and commeth unto the superiour: hee

that

that causeth himself to be instituted into a benefice, the Incumbent thereof being alive, himself is to be deposed from his orders.

While any Benefice, or Bishoprick is void, nothing is to be changed or innovated in it; and such gifts, sales, or changes of Ecclesiasticall things, as are made by the Bishop, or any other like Prelate, without the consent of the Chapter, are void in Law: and such Benefices as doe become void, are to be bestowed without any impairing or diminution of the same.

In what case the goods and possessions of the Church may be alienated, and in what not, and that such things as are alienated, be alienated by the greater part of the Chapter, otherwise the alienation is void: What goods of the Church may be lent, what sold, what bought, what changed, what demised, or let to lease, what morgaged, or let to pawne. After these follow Testates of last Wils and Testaments, of succession by way of Intestate, of Burials, of Tythes, first Fruits and Offerings: of Monkes, and their state in sundry sorts; of the right of Patronage, of Synodals and Procurations, of consecration of Churches, of Celebration of Divine service, and the Eucharist, of Baptisme, and the effect thereof, of a Priest not baptized, of Fasting, Purification of women, and other like ceremonies pertaining to Ecclesiasticall discipline: Of building and repairing Churches, and of their Church yards, and the immunitie that belongs to them both, and of sundry other things in like sort pertaining to the Church. That

Clerks

Clerks and other Ecclesiasticall men trouble not themselves about Civile matters, contrarie to their office and profession.

CAP. V. SECT. VI.

What is contained in the fourth Book of the Decretals.

THE fourth Book disposeth of matters of Espousals and Matrimonie, and sheweth what words make Espousals, what Matrimonie, of the Betrothing of such as are under age, of clandestine Espousals and Contracts, and of what account they are to be had of in the Church, and how they may be made good: Of her that hath betrothed herself to two men, whose wife shee shall be, what conditions may be put in Espousals, and what not, what Clerks or Votaries may marrie, and what not: Of him that hath married her, with whom before he hath committed adulterie, and whether the same second Matrimonie be good, whereupon the resolution of the Law is, that if the woman knew not that he had an other wife, shee cannot leave her, his first wife being dead, under pretence he had an other wife alive when he married her; but if shee knew of it, and did joyne with him in practise for making away his wife, he cannot marry her, no though he were separated from the other, as concerning bed and board: Whether leprous men, and others which are infected with like contagious diseases may marry, and whether being married, the marriage

marriage may not be dissolved upon this point: Of kindred Spiritual or Legall, and in what sort they hinder marriage; of him that hath known his own wifes sister, or his own cousin german, and whether this offence do break the Matrimonie that is contracted, or doe hinder the Matrimonie that is to be contracted: Within what degrees of consanguinitie or affinitie a man may marrie: Of such as are cold of Nature, or inchanted by Sorcery, whether they may marrie; the like respect is of women, who are unfit for men: Of such as marrie against the interdict or prohibition of the Church, and what penaltie they incurre: What children be held legitimate; who they be that may be accusers or witnesses in cases of dissolution of Matriages between man and wife: Of Divorces between man and wife, which are moved by the diversity of minders that are then between them; for that one seeketh to go apart from the other; and in what cases divorces are allowed, and how many kinds there be of them: of gifts between man and wife, what security they have in Law: and that the Dowrie after the decease be restored to the woman, so that it be not in case of Adultery and other such like filthinesse: Of second Marriages, in what cases they are to be permitted, in what

order wife alive when he marrieth, in practise for knew of it; and did joyne with him in practise for making away his wife, he cannot marry her, no though he were separated from the other, as con-

ing bed and board: Whether leprous men, and others which are infected with like contagious diseases may marry, and whether being married the

marriage

CAP. V. SECT. VII.

What is the ſubject of the fifth Book of the Decretals.

THE fifth Book treateth of ſuch Criminall matters as are handled in Eccleſiaſticall Courts, wherein the proceeding is either by accuſation, whereto the Accuſer doth ſubſcribe his name, becauſe it tendeth to puniſhment: or elſe by denunciation, whereto the Informer doth not ſubſcribe his name, becauſe it tendeth only to the amendment of the party: or by Inquiſition, which for the moſt part is not uſed, but upon fame precedent, albeit ſometimes it be without fame: if once the fame be proved, then may enquiry be had of the truth of the fact, but yet without malice or ſlander. The Criminall matters which are proſecuted in the Eccleſiaſticall Courts, and cenſured by Canonicall puniſhments, are Symony, and ſelling of Eccleſiaſticall graces and benefices, whereupon Prelates are forbid to let out their Juriſdictions under an annuall rent, and Maſters and Preachers to teach for money. The puniſhment of Jewes and Saracens, and their ſervants, that is, If a Jew have a ſervant that deſireth to be a Chriſtian, the Jew ſhall be compell'd to ſell him to the Chriſtian for xij. pence: That it ſhall not be lawfull for them to take any Chriſtian to be their ſervant: That they may repair their old Synagogues, but not build new: That it ſhall not be lawfull for them upon good Friday,

to

to open either their doors, or windowes: That their wives neither have Christian Nurses, nor themselves be nurses to Christian women: That they wear divers apparell from the Christians, whereby they may be known, and other ignominies of like sort. Who be Hereticks, and what be their punishments: who be Schismaticks, and what be their punishments. Of Apostates, Anabaptists, and their punishments: Of those that kill their own children, and their punishments: Of such as lay out young children, and other feeble persons to other mens pity, which themselves have not; and how they are to be punished: Of voluntary or casuall murthers. Of Tilts, Barriers, and Torneament: Of Clerks that fight in combate: Of Archers that fight against Christians: Of whoredome, and adultery, and how they are to be punished: Of such as ravish women, and their punishment: Of Thieves and Robbers. Of usury and the pain thereof: Of deceit and falshood: Of Sorcery: Of collusion and cosenage, and the revealing of the same: Of childrens offences, and that they are not to be punished with the like severity as mens offences are: Of Clerks hunters, or hawkers, who if they often times use and sport themselves therein, if they be Bishops, they are to be suspended from the Communion three moneths, if Ministers or Priests two, but if he be a Deacon, he is to be suspended from his office: If a Clerk often times strike other men, and being admonished to forbear such kind of violence, doe nevertheless continue in his folly, he is to be deposed: If a Bishop cause any man rigorously to be whipt, he is to be

suspended

ſuſpended from ſaying ſervice two moneths: Such as ſpeak ill of Princes, and other like great perſons ſpirituall or temporall, are to be puniſhed, ſo that others by their example may take heed to ſpeak ill, ſpecially ſuch as blaſpheme the Majeſty of the Almighty God: If Clerks excommunicated, depoſed or interdicted, or that came to the higheſt order without paſſing thorough the inferiour orders, or that came to the ſame order covenouſly, and deceitfully, or being not ordered at all, or at the leaſt not ordered lawfully, dare take upon them either to miniſter the holy Sacraments, or to ſay divine Service, they are to be depoſed from their office, and from their benefice, and never after to be ordered: Prelates are not to grieve their ſubjects, either with raſh ſuſpenſion, or excommunication of their perſons, or interdicting of their Churches, but they are to execute all thoſe cenſures of the Church in judiciall order: they are not eaſily to ſuffer any man to hold two Benefices, where one may ſuffice, or to retein any thing to his own uſe, in a Church wherein he hath collation or ſubjection, and that he is not to beſtow any benefice upon any that is unworthy for the ſame, either in life or doctrine, with ſundry other exceſſes of Prelates in the like ſort: If any begin to build a Church or Chappell to the prejudice of an other, and it be denounced unto him by the Parſon or Pariſhioners of the other Church: That he goe no further in the ſaid worke, untill the Law hath determined it, whether it be a nuſance or not. Of the Priviledges of Prelates, and wherein they exceed their priviledge: Of Canonicall purga-

tion

tion which is injoyned, when as yet there is no certain proof of the crime, but there is a common voyce and fame of the fact, which is to be cleered by the oath of him who is charged by the fame, that he hath not committed the fact, and the oath of his good neighbours, who swear they believe that he hath taken a true oath; Of vulgar purgation, which was performed by combate, and passing by burning fire, which is worthily rejected, for that thereby the innocent many times was condemned, and God thereby did seem to be tempted: Of Ecclesiasticall punishments due to offences, among which one is, That so often as one offendeth, so often hee is to be punished: And that Prelates doe not take reward, to winke at men in their sinnes or turn corrections into pecuniary pains, for gain of filthy lucre: Of Penances and Pardons, or remissions: Of Excommunication, which is the greatest punishment in the Ecclesiasticall jurisdiction, and who, and in what cases men are to be strucken thereby.

* Other kinds of this vulgar Purgation were observed by the Ancients, as the triall by Water, by the Crosse, and by the Body of our Lord, &c. and these were of ordinary use amongst our own Ancestours, especially in the darker times. The *Saxons* (besides the triall by Combate, which they called Campefight) commonly used their fire and water Ordeals. Their triall by water was performed, either in hot or cold. In cold water, the parties suspected were judged innocent, if there bodies were not born up by the water, contrary to the course of Nature. In hot, they were to put their bare armes up to the elbowes, which if they brought out without hurt, they were conceived to be cleer of the crime. They that were tryed by the Fire-ordeall, were either to passe bare footed over a certain number of hot glowing ploughshares, or otherwise to carrie burning irons in their hands, a certain number of paces, and according as they sped, they were judged no-

cent

cent or innocent. This horrible experiment of Fire-Ordeall in the firſt kind, was tryed upon Queen *Emma*, the Mother of *Edward* the *Confeſſour*, with a ſucceſſe worthy of her chaſtitie. An example of the ſecond kind, and the like event, is recorded by *Eadmerus*, who relateth, that in the reign of *William* the ſecond a company of fellowes being ſuſpected to have deſtroyed the Kings Deer, were enjoyned for their triall, to carrie burning irons, which accordingly they did without hurt; the iſſue thereof being reported to the King, was entertained with ſuch a remarkeable indignation, that he furiouſly replyed; *Quid eſt id? Deus eſt juſtus Judex? pereat qui deinceps hoc crediderit.* How ſolemnly and ſuperſtitiouſly theſe Ordeals were performed; ſee *Lambard* out of his ancient Authour, in the word *Ordalium*. Read alſo the *Saxon* Lawes of King *Æthelſtane*, chap. 23. where it is ſaid, that the party ſuſpected, three dayes before his tryall, muſt goe to the Prieſt, and heare Maſſe, and feed for that time upon bread, and ſalt, and water, and wurts, &c. See the reſt in the Law. Theſe kinds of Purgations remained in uſe amongſt our Anceſtours, till the time of *Hen.* the 3. in whoſe reign they began to be aboliſhed, rather by deſuetude and in reverence to this Canon Law, than by any Statute of the Realm: as learned Mr. *Selden* hath obſerved in the Notes upon his forementioned *Eadmerus p.* 204. where alſo the Reader may ſee, how farre forth they were forbidden. Onely the tryall by Combate, though it be abrogated by the Canon here, is notwithſtanding permitted by the Law of this Land; but of very rare and conſiderate practice.

PART. II.

CHAP. I.

SECT. I.

What uſes the Civile and Canon Law have in this our Realm; and that the Civile Law reſpecteth, matters of ordinarie and extraordinary Cogniſance.

OF all thoſe goodly and excellent Titles of the Civile and Canon Law, ſo full of wiſdome,

ſo full of variety, ſo well ſerving for every moment, and ſtate of the common-wealth, in peace or in warre, as nothing can be more, the Profeſſours thereof have very little uſe here within this Realm.

For firſt, for the Civile Law, (beſide the two Univerſities of this land, that of *Oxford*, and the other of *Cambridge*, to whom the Kings of this Realm have granted a larger libertie, in the practiſe of theſe Lawes, than to any other place of the Kingdome; for that their purpoſe was, to have young men trayned up there, in a more ripe knowledge of theſe profeſſions, that when they came abroad, they might be more ready in all matters of negotiation and commerce, that the Prince or ſtate ſhould have need of them to deal in with forrein Nations when they were thereto called, to which the Lawes of this Land ſerve nothing at all, by reaſon of the difference that is between their Law, (which is either wholy the Civile Law, or for the moſt part grounded on it) and the Law of our Nation) a very few Titles are left to the practiſers thereof to deal in, and moſt of them ſeldome and rare in uſe, as ſhall be hereafter ſhewed, ſo that I may well divide all the profeſſion of the Civile Law here with us, into matters Ordinary and Extraordinary.

CAP.

CAP. I. SECT. II.

That the matters of ordinary Cogniſance are Marine, of which ſome are Civill, others Criminall, and what the Civill Marine matters are; and what manner of proceedings they have.

THE matters of ordinary cogniſance of the Civill Law here in this Land, are Marine matters, of which ſome are Civill, ſome are Criminall.

Civill matters are thoſe which concern either the free uſe of the Sea it ſelf, or the rights that men have to trade and traffique thereupon, or the bargains, ſales, or contracts, or as it were contracts that are made or done beyond or upon the main Sea, or any creek thereof, or within ſo much ſpace from the Sea, as the greateſt winter wave runneth out, for any matter belonging to any negotiation or merchandize, or any other thing to the Ship or trade appertaining.

And firſt for the uſe of the Sea it ſelf, the Law holds it to be common, and that every one hath right to trade and traffique upon the ſame, ſo that it be without the prejudice of that Prince or Land, to whom the Sea is adjoyning. The like may be ſaid for the ſhore it ſelf, that it be either for the refreſhing of themſelves with water, or victuall, or for the repayring of their Shippes, or buying any thing neceſſary thereunto, or it bee either for utt'ring of any commodity they have, or buying any thing again of the people, upon whoſe land they touch:

ff adlegem Rhodian. de Factu. tot. tit.

touch. In which case it were barbarous to repell any coming in peaceable manner; albeit it may happen upon some jealousie of the State, either for that it hath some great forrain Enemy, whose continuall invasion they fear, or that the Sea coasts are much infested with Pyrates, that in this case resistance may be made, but when it is made manifest by flag of Truce, or otherwise, they are no other but well meaning men, they are to be entertained with all kindness.

For Contracts in Marine causes, some are contracts in deed, some are as it were contracts: Contracts in deed are all bargains and sales whatsoever, made between Merchant and Merchant for any commoditie, fraught or traffique in the ship, or any sale or bargain made of the ship, or any thing thereto belonging, as Masts, cordage, anchorage, victuals, or any other thing of like nature, necessarie for the imployment of the ship.

Those things which are as it were contracts, are those perpetuall rights which are between the Purser or Master of the Ship, and the Passengers, or between one passenger and another.

The perpetuall right which is between the Purser or Master of the ship, and the Passengers is, that the Purser or Master be answerable for all such wares or goods as are brought into the ship, whether it be delivered to himself, or any of his Mariners: for he ought not only to be just and honest himself, but also use the ministery of honest people about him; and therefore the Master of the ship is no lesse bound for their persons than his own. The

Passen-

paſſengers again are honeſtly and readily to pay the Maſter of the ſhip their fraught, and all ſuch other charges of dyet, and other proviſion as they have put him to; wherein if there be any default of any ſide, the Law affordes an action called *Exercitoria*, whereby the one or the other may be relieved.

The Maſter of the ſhip is he, who hath the charge of the whole anchorage and government of the ſhip, and his office is either to let the ſhip to hire, or to buy and ſell Merchandiſe, or to plie fares, or to provide tackle and furniture for the ſhip. *L. 1. ff. de exercitoria axion.*

The Purſer, whom the Law calleth *Exercitor Navis*, is he to whom all the profit or revenue of the ſhip doth come, whether it be in his own right, or in anothers. *D. ead. l. prima §. 16. de exercit. action.*

The perpetuall right that is between paſſengers and paſſengers, and ſaylers and paſſengers is, that in caſe of ejectments, and caſting out of goods, and other merchandiſe into the Sea in time of tempeſts, or other dangers, by rocks or quick ſands, for the lightning of the ſhip, becauſe it is for the common good of all that are in the ſhip, and the preſervation of the reſt of the fraught of the ſhip, it be made up with the common contribution of all: for good reaſon it is, that they whoſe goods are ſaved hereby, ſhould again with their goods redeem the others loſs, according to ſuch proportion of goods, as they have in the ſhip, and the Law of the Sea allowes.

But in caſes of Ejectments, the Law of the Sea is this (which was taken from the people of *Rhodes*, who in old time were great ſeafaring men, and diſ-

coverers of ſundry countries, whoſe rules even to this day are holden for good among all Marriners, for the great equitie and indifferencie that is in them) that as well the Maſter or purſer of the ſhip himſelf ſhall contribute for the preſervation of his ſhip, as alſo the paſſengers for ſuch ware as they have in the ſhip, of what ſort ſoever it be, albeit happily it be but of ſmall weight, as pearles pretious ſtones and ſuch like; and if perchance there be ſome paſſengers in the ſhip who have no ware or merchandiſe in it, yet becauſe themſelves are a burthen to the ſhip, eſtimate is to be made of his or their apparell, rings, and jewels, according to which he or they are to contribute towards the loſſe of ſuch things as are caſt out into the ſea: neither is there any thing in the whole ſhip excepted, ſave onely things which are put therein to be ſpent for the common good of all, as victuals, fuell, and ſuch like; for thoſe things are not brought in for any one private mans uſe, but for the benefit and ſervice of all: and ſo much the rather, for that if victuals fail, or other like neceſſaries be wanting, every one muſt contribute thereto, or impart that which he hath for his own private proviſion; but of mens own bodies, unleſs they be ſervants, there is no rate to be ſet, becauſe a free-mans body cannot be eſteemed.

In priſing, eſtimate is to be made as well of thoſe things which are loſt, as thoſe things which are ſaved, and the price is to be ſet down, not for how much they were bought, but for how much they might be ſold, and that for the preſent, leſt the con-

contributors ſhould be overmuch charged. Neither is it to the purpoſe that the goods which were loſt, might have been ſold for more, for that herein regard is not to be had of the gaine but of the loſs. And if any thing that was thrown out were known to be decayd, or made worſe by waſhing with ſalt water, it is not to be eſteemed as a new freſh thing, but the price thereof is to be rated accordingly.

Now the contribution is to be made in this manner, firſt the loſſe is to be ſet down, then the rate of thoſe things which are ſaved, out of which muſt be drawn an equall portion, proportionable to the quantity of every mans good he hath in the ſhip, to make up the loſs, deducting out of the loſers goods for himſelfe, ſo much as is anſwerable to his proportion, ſo that he ſhall neither be made a cleer ſaver, nor a cleer looſer, but in a certain quantitie rateable to his part.

But this contribution is in that caſe to be made, if the ſhip be ſaved; for otherwiſe if a wrack happen, either before the ejectment, or in the ejectment, then whatſoever any of the vectors or paſſengers catch, is his own; neither is there any regard to be had of the loſs of the ſhip, or of the goods, unleſs perhaps afterwards they be drawn out of the ſea.

But here we are to note, that neither the things that are thus ejected, ceaſe to be the firſt owners, neither become his that takes them up; for becauſe the firſt owner doth not count them for goods caſt away, but ſtill he beares that mind to them, that if he may recover them, he will hold them as his own goods, and in conſideration of ſo much

as afterward he ſhall recover, the contribution in the reſt ſhall ceaſe.

Neither if the Maſter of the ſhip himſelf by violence of the Tempeſt, ſhall looſe a Maſte or a Saile, ſhall he be more allowed therefore than a Carpenter to whom a houſe is let out to be built, ſhall be allowed for his axe or ſawe if he breake it.

Beſide in matters of wrack, there is as it were, a contract between them which have loſt their goods by ſhipwrack, and them upon whoſe Lands the ſaid goods are driven, that the ſame be reſtored to them or their heires of they come in due time to claim the ſame: and therefore it is preciſely forbid by the Law, that no man ſhall meddle with ſuch as are wracked, and ſuch as are proved to have ſtoln any thing thereout are holden for robbers; for that ſuch goods being caſt on land, and recovered out of the ſea, remain ſtill his who was the owner thereof, and deſcend upon his heire, neither eſchest unto the King, neither to any other whom the King hath privi'edged in this behalf. And therefore the Emperour *Conſtantine* the great, ſaith worthily in this caſe; *If any ſhip at any time by ſhipwrack be driven unto the ſhoare, or touch at any land, let the owners have it, and not my Exchequer meddle with it: for what right hath my Exchequer in another mans calamitie, ſo that it ſhould hunt after gain in ſuch a wofull caſe as this is?* And yet if no kindred appeare within a year and a day, or appearing prove not the goods ſhipwracked to be theirs, the goods come to the Exchequer even by that Law: ſo much that law condemneth careleſneſs, which is written

L. ne quid. ff. de incendio, ruina, & naufragio.

L. 1. lib. 11. C. de naufragiis

Vigilantibus

Vigilantibus & non dormientibus. And with this agree the Lawes of this Land, as taken out of thoſe imperiall lawes; whereby it is ordered that ſuch goods as are ſaved out of the wrack, ſhall be kept by the view of the Sheriſe, or ſome other chief Officer, and delivered to the hands of ſuch as are of the place where the goods were found, ſo that if any ſue for them, and prove them to be his, or to have periſhed in his keeping, they ſhall be reſtored unto him without delay; otherwiſe they eſcheat unto the King, or to him to whom the King hath granted the ſame: And if any convey away any part of the ſame goods contrary to the law, and be attainted thereof, he ſhall be awarded to priſon, and make fine at the Kings will, and yeild damages unto the party grieved: and a wreck by the lawes of the land, is where all living things within the ſhip do periſh, * but if a man, a dog, or a cat do eſcape out of the ſhip alive, it is otherwiſe,

* *Mes ſi un homme, ou un chien ou catte eſcape vive iſſint que le partie a que les biens ſont veigun deins lan & jour & prooue les biens deſtre ſes il avera eux arere per proviſion del Statute de Weſtminſt. 1. c. 4. fait en les jours del Roy. E. F. 1.*

For matters of contract, they are either in the petitorie, or in the poſſeſſorie. The Petitorie is where the propertie of any thing is challenged, this of all other ſuites is the hardeſt, becauſe the proof thereof is very difficill: for albeit the propertie of things may be got by many meanes, as well by the law Civill, as by the Law of Nations; yet it is not a thing ſo eaſie to be proved, for that there muſt concur many things to the proof of a property otherwiſe you ſhall faile in your ſuit, as in caſe of bargain and ſale, that there was ſuch a contract between the buyer and the ſeller, that there was either money payd for it, or that he that ſold it was con-

Inſtitut. de rerum diviſione §. ſingulorum ff. de acquirendo rerum dominio. l. adeo & toto titul. C. de quadriennis preſcript. l. bene.

C. de acquirend. poſſeſſ. l. 1. ext. c. 1. de conſuetudin.

content to take the buyers word for it, that delivery was made thereof, otherwiſe the property paſſeth not, but onely in ſome few caſes, in which neither poſſeſſion nor delivery is required. Laſtly, that he which ſold it was rightfull owner of it, otherwiſe can he not paſſe over a thing he had no right unto.

The Lordſhip or propertie of a thing is bipartite; for either it is direct or full, ſuch as men have when they have not only the thing it ſelf, whereof they are Lords or Proprietaries, but alſo the uſe and comodity thereof; or elſe it is profitable, as is the hold of Tenants and Farmers, who have the uſe, gain, and poſſeſſion of the thing, but the Lord the property and rent in acknowledgement of his right and Soveraignty.

The poſſeſſorie is that right whereby the uſe or poſſeſſion of a thing is claimed of which there be three ſorts: for it is in getting the poſſeſſion of that a man hath not, or in keeping of the poſſeſſion of that a man hath, or in recovering and regaining of the poſſeſſion of that which is loſt.

The proceeding in all theſe Civile matters, is by Libell concluding to the action, the partie agent giving caution to proſecute the ſute, and to pay what ſhall be judged againſt him, if he fail in the ſute: the Defendant on the contrary part, ſecuring his adverſarie by ſufficient ſuretie, or other caution, as ſhall ſeem meet for the preſent to the Judge, that he will appeare in Judgement, and will pay that which ſhall be adjudged againſt him, and that he will ratifie and allow all that his Proctor ſhall do

in

in his name: for to all these ends satisdation in Judgement is, which is nothing else but a course to secure the adversarie of that which is in debate before the Judge, that on what side so ever the cause shall have an end, the clients may be sure to get that, which by law shall be adjudged unto them.

CAP. I. SECT. III.

What are the Criminall marine matters, whereof the Law Civile holdeth plea here with us, and what proceeding they have.

AND so much of those Civile Marine matters whereof the Civile Law here in England usually holdeth plea. Now of the Criminall matters which belong to that Court, but yet by way of Commission from the Prince, and that is that horrible crime of Piracie, detested of God and man, the actors wherein *Tully* calleth enemies to all, and to whom neither faith nor oath is to be kept.

†*Cicer. 3. lib. off.*

Piracie is called of the Greek word πεῖρα, which is * *Deceptio* in Latine, and in English *Deceit*, for that many times they pretend friendship when they intend nothing else but robberie and blood-shed; or they are so termed of the word πείρειν, that is, of their wandring up and down, and resting in no place, but coasting hither and thither to do mischief.

*In an Attick sence, for they said πῖρα, Ἀντὶ τῆς ὁδοῦ & πείρᾳ, and from this sence οἱ ἐπὶ θαλάσσης κακοῦργοι, were called πειρατὴ, Pirates, as the *Scholiast.* of *Sophocles* hath noted upon *Ajax.*

A Pirate is a Sea-thief, who for to enrich himself either, by subtilty or open force, setteth upon Merchants and others, trading by sea, ever spoyling them

them of their loading, if they get the upper hand, and sometimes bereaving them of their life and sinking of their ships.

The proceeding of those criminall matters, is by accusation and information, and after by triall of twelve men, upon the evidence, according to the lawes of this land, and the lawes of the ancient Feudes of *Lombardie*, where the like tryall is, and from whence it seemeth this of ours was first derived. But here must we note that matters of reprisals are no piracies, although many times there fals out no less outrage in them, for spoyling and slaying of men, than doth in the other: for that Reprisals are done by the Princes commission, granted to the subject, for redress of some injurie done to himself or his subject, by some other forreign Prince or subject, and amends hath been required by law, and cannot be had, whereupon licence is given to the subject to relieve himself by what way he can against the other Prince, or any of his subjects, by taking so much goods of his, as himself was indamaged; which course is held among Princes, the rather to afford Justice where it is lawfully demanded. *Bartol. l. nullus num. 2. C. de Judæis & Caliculis.*

CAP.

CAP. I. SECT IV.

That the things which extraordinarily belong unto the Cogniſance of the Civile Law, are of three ſorts, and concerning the firſt, which reſpecteth treaties between Prince and Prince.

AND thus much of the cauſes, which ordinarily do belong unto the Cogniſance of the Civile Law within this land. Now it followeth, that I ſpeake ſomewhat of thoſe things wherein the Civile Law dealeth incidently, and by authority of the Prince, and is not the ordinarie object of the Civile Law, howſoever otherwiſe they cannot be handſomly dealt in, but by ſuch as have the skill of the Civile Law.

Whereof there be three ſorts, the firſt is matters of forrein treatie between one Prince and another, the ſecond is the ordering of martiall cauſes, whether they be Civile or Criminall in an Army; the laſt is the Judgements of Enſignes and Armes, and the deciſions for challenges of rights of Honour and precedencie, where any of them is in controverſie.

For the firſt, whereas all other Nations in compaſſe round about us be governed by the Civile Law, and treaties are to be decided by Law (both for thoſe things which are in queſtion, and to be concluded by law, and for thoſe things which are determined by conſultation and agreed upon) who is thereto to be choſen rather than a Civilian, to whom

whom their Law is known, as well as to themselves? and if perhaps he understand not their language; yet he understandeth that language wherein the Lawes themselves are written, & is the fittest tongue for treatises between Princes & Princes, because it is a common tongue to be learned of all the West part of the world, and thereby any Prince shall retein his own Majesty in parlying, as it were, in his own language, and not be forced to speake in an other Princes tongue, which, no doubt, is a great disadvantage to him that shall treat; for that every Nation hath some proper *Idiom*, not so well discerned by the book-speaker, as perceived by the Natives of the countrey where it is spoken; and wherein a stranger may easily be deceived.

How much forreine Princes do esteem of the skill of a Civilian in these matters, it may be understood thereby, that they never for the most part send any Embassage for the treaty of any league or matter of commerce, but that one or more of them are Civilians. And if the care of these things be so great with them, surely the estimation of the same ought not to be light with us: for by what lawes their leagues and negotiations use to be directed, by the same must ours be ordered, so that for that point, one kind of learning must serve for both; for that otherwise one Nation will not be convinced by the other what their capitulations are.

Surely such as over and besides their own experience, have the knowledge of the Civill Law, have herein a double help above another man that wanteth

wanteth the ſame. Firſt, their own underſtanding, which for the moſt part is of like proportion as other folks: The skill of the Lawes themſelves which are a quinteſſence of wit above other humane learning, and were either wholy compoſed of the mature and deliberate reſolutions of ſuch Emperours as then ſwayed the whole world, or were the dooms and judgments of ſuch wiſe men as then managed the whole world, and the affaires thereof under them. But who, when he ſeeth a ſword in its ſcabard, knoweth whether it will cut or not, although the form thereof be a preſumption, that it will: but, do but draw it out of the ſcabard, and try the blade thereof, and then ſhall you ſee the ſharpneſs of it? I make no application hereof, for that my meaning by my words may be well enough known.

But in theſe matters the wiſdome of the State knowes beſt what is to be done, and I only remember what other Nations do, leaving the reſt to their graveſt conſiderations, who by precedents of former times, and men of experience, furniſhed with exotick tongues, have carried this part of policie very well and ſafely hitherto: but now to the ordering of Martiall cauſes.

CAP.

CAP. I. SECT. V.

What are Martiall causes, which are the second extraordinary matter belonging to the Cognisance of the Civill Law with us.

MArtiall causes are either Civill or Criminall, whereof both are determinable by the Civill law. A Civill Martiall Cause, is where either the Captaine or the Souldier requireth something that is due, and withholden from him, as his stipend, his apparell, which among the *Romans* was due twice a yeare, that is, the Sommer apparell from the first day of Aprill to the first of September, and the Winter from thence to Aprill; his diet which among the *Romans* was two dayes hard bisket, the third softer bread, one day wine, another day vinegar, one day bacon and two dayes mutton; his priviledges either in cases of preferrment, as to be removed from one degree to another, or in cases of immunity, as to be freed from all servile functions and sundry other like, which a diligent reader may gather out of the Digest and Code of militarie affaires, and other like titles which accompany them.

ff de re militari & C. eod. tit. l. 12. ff. de privilegio veteranorum: & de castrensi peculio & C. eodem tit. l. 12. C. de erogatione militaris annonæ & C. de vest. militari.

Souldiers faults are either proper to themselves, or common with others.

Those are common with others which other men fall into, and are corrected with like ordinary proceeding, as other crimes of like nature are, as manslaughter, theft, adultry and such like.

Those are proper which do properly appertaine to militarie discipline, and are punished by some unusuall

unusuall or extraordinary punishment, as are these not to appeare at Musters: to serve under him he ought not to serve: to vage or wander long from the Tents, although he returne of his own accord: to forsake his Colours, or Captain: to leave his standing: to fly over to the Enemy: to betray the Hoast: to be disobedient to his Captain, Coronell, or Lieutenant, to loose or sell his Armour, or to steale another mans: to be negligent in forage, or providing of victuall: to neglect his watch: to make a moteny, to fly first out of the field, or other like, which is delivered in the late cited titles. Concerning this *Arrian* who wrote the life of *Alexander* the great saith; *Every thing is counted an offence in a Souldier, which is done contrary to the common discipline; as to be negligent, to be stubborne, to be slothfull.*

The punishments wherewith Souldiers are corrected, are these, either corporall punishment, or a pecuniarie mulct, or injunction of some service to be done, or a motion or removing out of their places, and sending away with shame.

By capitall punishment is understood for the most part death, or at the least beating, unless happily it be pardoned, either for the unskilfulnes of the Souldier, or for the mutinie of the company, being thereto drawn by wine and wantonnes, or for the alteration or pittie of the party offending.

All which a wise Judge moderateth according to the qualitie of the person, the quantitie of the offence, and the opportunity of the time.

CAP. I. SECT. VI.

That the third and last matter of extraordinary Cognisance in the Civill Law here with us, concerneth the bearing of Armes, and ranging of every man in his proper place of honour: and first of Armory.

THE last extraordinarie matter that the Civil Law Judge dealeth in, is the bearing of Armes, and the ranging of every man in his roome of honour according as his place requires: and here first of Armes. For skill in Armorie, although it be a thing now almost proper to the Heraulds of Armes, who were in old time called *Fecialis*, & *Caduceatores*, because they were messengers of war and peace; either to proclaime the one or denounce the other: yet the ground thereof we have from the Civile Law, so that thereby to this day they may be directed in their skill or controlled if they doe amiss.

C. ut nemo privatus prædiis suis vel alienis vela regia imponat, ne nemini liceat sine Fud. author: signa imponere.

For besides that there are many other places in the law which touch armorie, as appeareth by the titles here quoted in the margent, *Barthol.* hath maketh a speciall tractate thereof, and divideth the whole matter of Armes into three ranks according to the divers sorts of men that bare them: for some are Armes of some publick dignitie and office, as the Armes of the Legate, or Proconsull, the Armes of Bishops, the Armes of the Lord Admiral: other are Armes of speciall dignities, as Armes of

Kings

kings and Princes, which no man is to beare or paint in his house or stuffe unlesse it be to shew his state or subjection therein.

The third sort is, of those which are private Gens Armes, of whom part have them by the grant of the Prince; or by authority of those to whom the Prince hath given power to grant Armes to others, as hath the Earl Martiall within this Realm of England, others have taken them by their own which albeit in former times they might do, as also they might take such names as every one did like of (for names and signes in the beginning were invented, for to know and discerne one man from an other) and as every man might change his name, so might he change his signe, so that it were not done by fraude and deceit: but after it was forbidden: and that any man should change his name, because it was not thought it could be done with any good meaning, and that no man shall beare Armes of his own authoritie; and therefore Officers were appointed under Princes, (as I have said) who should give armes to such as deserved well of the common-wealth, either in warre or peace: for although in the beginning armes and colours were proper to men of warre, to avoid confusion in the hoast, and to discerne one company from another, yet when it came to a matter of honour, it was challenged no lesse by men of peace, than by men of war; and true indeed is that saying of *Tully*, *Parva sunt bella arma nisi est tranquillum domi*: and the Emperour speaking of the benefit that Advocates, and such like bring to States and Common-wealths,

C. de statuis & imaginibus ut nemini liceat signum salvatoris, &c. l. ebis qui potentiorum nomine titulos prædiis suis affigunt. & ibi doct. ff. de rerum divisio. l. sanctum. C. de ingenuis & manumiss. l. ad recognoscenda. ff. de rerum divisione l. sanctum. C. de mutatione nominis l. 1. ff. de Falsis l. falsi nominis.

L. Advocati C. de Advocatis diversorum judiciorum.

saith thus, Advocates which breake the doubtfull fates of causes, and with the strength of their defence sundry times, as well in publick causes as in private, raise up those that are fallen, and relieve those which are wearied, do no less good unto mankind, than if by warre and wounds they saved their parents and countrey: for we (saith he) do not count that they onely do warre for our Empire, which do labour with sword, shield and target, but also our Advocates, for indeed the Advocates or Patrons of causes do warre, who by confidence of their glorious voyce do defend the hope, life, and posteritie of such as be in danger: thus saith he, and thereupon commeth that distinction of *Castrense peculium, Et quasi castrense peculium*, signifying thereby, that albeit Counsellours to the state, Lawyers, and such like be not actuall warriers, yet they are representative warriers, and do no lesse serve the Common-wealth than they. The Souldier riseth betime in the morning, that he may go forth to his exploit, the Advocate that he may provide for his Clients cause: he wakes by the trumpet, the other by the Cock; he ordereth the battell, the other his Clients businesse; he taketh care his tents be not taken, the other that his Clients cause be not overthrown; so then either of them is a warrier, the one abroad in the field, the other at home in the Citie. Besides *Barthol.* greateth in this place what things are borne in Armes, either naturall, as beasts, birds, fishes, mountaines, trees, flowers, sun, moon, starres, or such like: or artificiall, not taken from things existent, as colours, simple and

mixt,

mixt, divided by ſalles or quarters, or by lines direct, croſſe, or overthwart, or ſuch other: then how each of theſe are to be carryed, wherein Art muſt follow Nature, that every thing figured, be borne according to the nature of that which it doth figure, and not otherwiſe: and therefore as in enſignes, flagges, or ſtandards, the ſpear or ſhaft goeth before, and the ſtreamer or colours follow after, ſo the face of every creature that is figured or deſcribed in the banner or hatchment, muſt look unto the ſhaft or ſpeare; unleſſe a man beare two creature, one looking toward the other, for then this obſervation hath no place, for vaine it is, to conjecture when things are certain, otherwiſe it is the nature of the face to go before, and the body to follow after: and the like reaſon is of the parts of every creature which is likewiſe borne in Armor, which are diſtinguiſhed by before and behinde, whoſe ſight muſt be ſuch, that the head look to the ſpeare, otherwiſe would it ſeem to goe back like a Monſter: but if the forepart alone of any creature be borne in a Scucheon, as often it happeneth that men give only a Lyon, Beare, or Buls head for their Armes, then muſt not the head directly look unto the ſhaft, but aſide: further, every of theſe creatures be ſo deſcribed in the coat, as his vigour and generoſity be beſt ſet out, whether it be a fierce or ſavage beaſt, or a milde and gentle creature. But for colours his rule is, that the nobleſt colour be put in the firſt part of the field, howſoever the coat be divided, quarter or pale. And of colours the golden colour be the chiefeſt, as that which doth fi-

gure the Sunne, which is the fountain of light, which is most acceptable to every mans eye. The next is Purple or Red, which doth figure the fire, that is the highest and noblest of the four Elements, and next the sunne it selfe in dignitie. The third is Blew, of the Heraulds called Azure, and *Caerulum* in Latine, which figureth the Aire, which is a cleer and transparent body, and most capable of light, and cometh in nobility next after fire. The fourth is White, which cometh neer to Light, and therefore is more noble than Black, that draweth neer to darkness, and therefore is the basest of all colours, as ever one hath more or lesse of White or Black, so either they are nobler or baser in reputation or degree. And thus much in generall as concerning the knowledge of Armes.

CAP. I. SECT. VII.

Concerning the Places and Successions of Princes and other honourable Personages; and first of their Places.

Nedham. 37. *Hen.* 6. *fol.* 21.

NOw followeth what the Civile Law holdeth as concerning Princes, and other honourable Persons, and their successions and places, which a grave Judge of this Land hath anciently acknowledged to belong unto the Civile Law.

By the Civile Law, all power cometh from God, as the Scripture teacheth, and among powers the two greatest are the Empire and the Priesthood;

for

ſo as God hath ordeined the one to rule the outward man, and to bring all his actions within the compaſſe of reaſon, and ſo to eſtabliſh common-wealths and to order the ſame: So alſo hath he provided the other for the inſtruction of the inward man, and the planting of Religion among men.

By the Empire, I underſtand not onely the Empire of *Rome*, (which ſometimes bare rule over moſt part of the world, at the leaſt ten mighty Kingdomes, which now are grown into particular Empires and Monarchies themſelves) but alſo every ſeverall Kingdom, which acknowledgeth no other Emperour than his own Soveraign; for howſoever they differ in name and title, yet is the office it ſelf all one: for every one of them is Gods immediate Vicar upon earth in their own Kingdomes, for matters appertaining to Juſtice. Whereupon the Civile Law gives them very honourable titles, ſometimes tearming them Gods upon earth, for the great authority they have over other men under God; ſometimes Miniſters of God, for the ſervice they do God in their own Common-wealths; ſometimes moſt holy and moſt religious, for the care they ought to have about Religion, and correcting of thoſe things which are done againſt the feare of God; for a King ought in all things to propound the Word of God before him for his rule, and to follow the doctrine of the Apoſtles; ſometimes they are called moſt milde, becauſe a King in all the courſe of his life; but ſpeccially in matters of puniſhment ought to imitate the Grace and favour of Almighty God.

ff. de leg. 2. l. ff. de legat. 2. l. C. 4. tit. 13. C. 1. tit. 3. l. 56. C. 1. tit. 1. l. 5. C. 1. tit. 1. l. 5. C. 5. tit. 4. l. 23.

L. fin. C. de ver. signif. c. de dignitat. l. 8. lib. 12.

Although the Emperour or King be reckoned among his Nobilitie, because he should not bee puft up with the glorie of his place, and conceive he were of a more excellent mould than the reſt, when indeed we are all one, and the ſelfe ſame clay; yet he is both by the ordinance of God and man

1 Petri c. 2. ver. 13.

ὑπερέχων (as the Apoſtle termes him) among them, that is, one who is ſupream Soveraign above the reſt, and whom they ought in all things to obey, ſo it be not againſt the Law of God, and common Juſtice; for himſelfe is inſtead of the whole Law, yea he is the Law it ſelfe, and the onely interpreter thereof, as in whoſe breaſt is the whole knowledge of the ſame; which albeit the Doctors do hold with a qualification, as thereby underſtanding not onely the Princes perſon, but alſo his Chancellours, both which put together, make up a perfect ſtate of a Prince: yet forasmuch as all that benefit of wiſdome and government that cometh from them unto the Common-wealth, is principally derived from the Prince as from the head, who hath vouchſafed to make them, as it were, members of his body, and ſo by them to derive the power of his government unto all, it may be rightly ſaid that in the Princes breaſt reſteth the fullneſs of all knowledge, for the well ordering of his common-wealth; for what they ſee, they ſee for him, what they heare they heare for his uſe, what they underſtand, they underſtand to do him ſervice, and ſo conſequently of the reſt of the actions of the mind and body, they obey the Prince as their Soveraigne: ſo then as the Prince hath the primacie in

Abc ſignifie. via ext. de penitentiis, &c. C. 6. t. 23. l. 19. C de teſt. b. l. omnium.

the

the government of his common-wealth, and all those which governe under him, governe by, and for him; so also hath he the precedencie, and *proeliss*, or foresitting in all assemblies before the rest, and such other as have precedencie or foresitting, have it by the Princes indulgencie.

Next unto the Prince is his Queen, who shineth by the beames of her King, and hath the like prerogative as himself hath. After them comes next in place the Kings Children, because children in a sort are partakers of their Fathers dignity: but yet among children there is a difference, that the male be preferr'd before the female, and among those which are males, the eldest have the preheminence in going, sitting, speaking, and other like matter of respect. After the Kings Children follow in the next rank Dukes, after them Marquesses, then Earls, fourthly Viscounts, and last Barons, all which have dignities either heritable, or granted by the bounty of the Prince, whereupon their nobility is founded, and whereby they only and no other are to be accounted Peers of the Land. Among these, for courtesy sake, are reckoned such as descend of Noble Houses, every one according to his degree, unto the third generation: and the daughters of these great Houses, so long as they marrie to any that are in degree of Peers, retein their fathers dignity, but if they marrie under the degree of Peers, then they lose their fathers place; and follow the degree of their husband; which notwithstanding is in practice otherwise here among us, but without any warrant of Law. The like is of the Widowes of the Peers,

C. 7. tit. 37. l 3. in princip.

L. 1. C. de dignitat. lib. 12.

L. Mulieres 13. C de dignit. l. 12. C de equestri dignitat. l. unic. lib. 12.

peers, who while they live sole and unmarried, retein the nobility of their husbands; but if they marry, then they follow the condition of their second husbands, be it honourable or otherwise.

Cujacius lib de Feudis.

Next in place after Peers come Knights, whereof *Cujacius* following the moderne *French* Heraldrie, maketh three sorts; one whereof hee calleth *Chevalliers*, the other *Banerets*, the third *Bachilers*, but setteth down no proper difference of the one from the other, and therefore I leave that to bee enquired of those, which shall be curious thereof. Among the *Romans*, for ought that I have read, there was but one order of them, and they were next in degree to the Senators themselves, as with us they are to the Peers.

L. cum te C. de Nuptiis.

Between Knight and Doctors of the Law, hath ever been question for precedencie, since either of them hath been in credit in Common-weals, as may appear both by the comparison that *Tully* maketh between *Lucius Murena*, a Knight of Rome, and *Publ. Sulpitius* a Lawyer, either of them standing for the Consulship, in his eloqnent Oration made for *Murena*, and many disputes of *Bartol.* and *Baldus*, arguing the case to and fro, which although it be yet disputable in forrein Countries, where the Civile Law is in credit; yet here among us where all preferment ir taken from it, and the Professours thereof are shut up, as it were, into a narrow corner of their profession, it is without controversie, and the priority thereof indubitable: but yet this is the resolution of those which are learned in this point, that in such acts as concern learning, a Doc-

Chassaneus de gloria mundi lib 9.

tor

ſtor is to bee preferred before a Knight, but in acts that concern military knowledge, a Knight takes place before a Doctor: but in other acts which are neither proper to the one, nor to the other, firſt are preferred ſuch Doctors as attend about the Prince; ſecondly ſuch Knights as waite upon the Prince; thirdly ſuch Doctors as being not about the Prince, are excellent in learning; fourthly come Knights without any place of preferment; laſtly Doctors of meaner gifts and place.

Although by the Civile Law there be no Gentlemen of title under Knights, but all the reſt went under the name of people, yet in other commonwealths there are, and with us bee, even in this rank, which have names of prebeminence, whereby they are in degree above the reſt; as with the French there are *les Gentilhommes*, and *le Gens de ordinances*, and with us are Squiers and Gentlemen, all which give Enſignes or Coat-Armours, and thereby are diſtinguiſhed from the meaner people: in which reſpect *Bartol* calleth them Noble, but yet of a weak nobility, for that it hath no further prerogative in it, than that it makes them differ from the baſer ſort of people. *Bartol tract. de Inſign.*

Of theſe two ſorts of Gentlemen with us, the Squier hath the priority, * who ſeems by the common name we give him in Latin, to have had his

* And ſo it might have ſeemed by the Engliſh name, for though we

now call their kinde of Gentlemen an Eſquier, yet our Anceſtors called ſuch a one *Scyld-cnapa*, a ſhield-knave, that was the knave (or as wee ſay now, the boy or ſervant) that uſed to bear a Shield or other Armour after his Maſter in the wars: and this is anſwerable to the Latin *Armiger*, and to the originall of the digniy; whereas the word Eſquier (which we now uſe) from the *French*, properly noteth another thing. *L. 1 C. de dignitat. lib.* 10, & 12.

Homer. Il. Plin l 35. natur. hist.

his origen, either for that hee carried the Armour of the King, Duke, or other great personage, as wee see not only in holy Scriptures *Saul* and *Jonathan* had their Armour-bearers; but in Poets and other prophane stories, *Patroclus* was *Achilles* Armour-bearer, and *Clitus* great *Alexanders*: where upon some write that ὁπλίτης, *sive* ὁπλοφόρος, which is he whom we call *Armiger* in Latin, is a footeman, that with a spear, shield, or head piece, followeth an armed Knight in battaile, or rather as some other suppose, it is the footman himself armed in the field: howsoever the word be taken, this is sure, that these were men of good account in the old time, as those which won themselves credit out of war, and so their estimation remained in their posterity, and as those were in time before, so are these which are in our dayes, descending, for the most part, from their worthy Ancestours.

There is no dubbing or creating of these by the Princes hand, or him to whom the Prince hath given authority, as it is in the creating of the Nobilitie, and the making of Knights, but every one whom the Captain hath vouchsafed that service, is by the service it self a Squier; and that not onely hee which hath done the service in warre, but also such which have done any equivalent service in peace, as Lieutenants, and Sheriffes of Shires, and Justices of Peace within their County: for even in this, as in other Promotions hath that distinction of the Law place, of *Castrensis peculii*, & *quasi castrensis*, whereby service of the Common-wealth at home, is levelled and made equall with that abroad.

broad. Gentlemen have their beginning either of blood, as that they are born of worshipfull parents, or that they have done some thing worthily in peace or warre, whereby they deserve to bear Armes, and to bee accounted Gentlemen, for hee is a Gentleman who is commonly so taken and reputed.

And this is the last and lowest order of them to whom Law doth allow any challenge of precedencie.

CAP: I. SECT. VIII.

Concerning the Succession of great Personages in their places of Honour.

NOw it followeth, that I speak something also, how great personages one succeed an other in their places of honour.

And first, to begin with the Empire it self, as the greatest earthly dignitie under God, albeit in the beginning it were raised up by no right, but by usurpation, *Julius Cæsar* changing the former government of the State, and challenging to himself the whole managing of the same; yet after it came to an orderly course, insomuch as hee that had the present possession of it, disposed it to his best liking by his last Will and Testament. So *Julius* himself devised it to *Octavius* his sisters sonne: and albeit that devise took not effect, by reason of the treason that was wrought against *Julius* his own person, so that *Octavius* was fain to recover it by an other

right

right, even by the death of *Lepidus* and *Antonius* his colleagues in office; yet that very will of *Julius* gave a pretence to *Octavius*, who after was called *Augustus* because hee did increase the Empire with many worthy Victories) to stand for the inheritance of the Empire; in consideration of which title the Senate and people of *Rome* more easily submitted themselves unto his government. *Augustus* in like sort bequeathed it to *Tiberius*, and *Tiberius* to *Cajus*: and so it came from one to an other, until some of them by cruelty and licentiousness of life, became so odious to God and man, that the people rose against them, and bereft them of that liberty, which they had prescribed in appointing of their Successors, and and somewhiles themselves, and somewhiles the Souldiers made choise of whom they thought good, or by whom they thought best to be rewarded. And thus the right of Succession unto the Empire, was toss up and down many hundred years betwixt Inheritance, Bequest, and Election untill at the last, it came unto that established state, as now it is in, and setled Electours of the Empire, so often as it happened to be voide. Succession in Kingdomes, in most part of the world, in former time hath been, and at this day is by right of blood, (a few onely excepted, which are Elective, as the Kingdome of *Poland* is at this day) and in Succession the eldest Sonne taketh place before the rest; and if there be no heir male, then the eldest daughter succeedeth in the Kingdome, and her issue: for Kingdomes (as also succession in other dignities) are impartible.

And

And yet *France* (to exclude *Edward* the third from the inheritance of the Crown thereof, who deſcended of *Iſabel* the ſiſter of *Charles* the fair, and ſo was next heire male unto the Kingdome of *France*) alleaged for themſelves the Law *Salick*, pretending none which claimed by the woman, albeit he were the next heire male in blood; was to ſucceed, as long as there were of the male line alive, how farre ſoever they were off in degree from the laſt King deceaſed. But this is but a meer device of the *French*, fathered upon ſome rotten Record of that part of their Nation, called *Salii*; of whom otherwiſe they have nothing memorable to ſpeak of, as being the baſeſt Nation among them all, of whom they report their people to have bin compounded: but this deviſe ſerved their turne then, whether it were anciently invented, or newly coyned. But howſoever they oppoſe themſelves againſt womens government, as *Bodine* their countrey-man hath of late ſtretched out the ſtrength of his wit to deviſe reaſons againſt the government of that ſexe: certain it is, that the Law of God hath allowed it, as it appeareth in the example of *Debora*, who being a Prophetesſe, governed Iſrael fortie years, and by her direction got the Iſraelites a mighty victory over *Siſera* the Captain of the hoaſt of *Jabin*: and wee among other Nation, have found by experience, *gynaicocratey* or womens goverment is nothing ſo unfortunate, as *Bodine* would make us believe it is. For both in our late Queen, and alſo in her ſiſter, (except only the caſe of Religion, wherein ſhe followed the error of the time, and was carried away more

Bodin: lib 6 de repub.

more with zeal than knowledge, and thereby is more to be pitied than to be envied) what is in their government, the wiſeſt Man-Prince in the world would not deſire to be in his own Regiment? for what is either in their private carriages, (ſo you give no eare to virulent and malitious tongues, who report ſurmiſes for ſubſtances, and tales for truths) or in their publick government, (ſo you lay not other mens faults to their charges) that any man may juſtly blame? For that I may paſſe over the reſt of their Heroicall vertues, fit for women of their State (ſpecially the late Queen, who was peerleſſe among all Queens that ever went before her, and unmatchable, as I verily do believe, by any that ever ſhall ſucceed her) as their magnanimity whereby they ſubdued, not only their domeſticall enemies, but vanquiſhed even their forrain foes, were their deſignements never ſo dangerous, not ſhewing any token of diſcouragement, either in the treaſonable attempts of the one, or in the malitious complotments of the other.

What an excellent work of hers was that, that then when all her neighbour Kingdomes round about her, drunk with the cup of the fornication of the whore of *Babylon*, ſhe alone came out of *Babylon*, and ſo continued conſtant to the end, mauger the threats of the red fiery Dragon, and the floods of water he caſt out of his mouth after her? How excellent did ſhe ſhew her ſelf in thoſe two vertues which doe chiefly preſerve Princes States; that is, Mercy and Judgement, the Records of her time doe ſhew, ſo that I may ſpare to remember any by

name,

ſame, which happily would not be well taken.

And yet, truth it is, that mens government is more agreeable to Nature, than womens is, whom God in the beginning put in ſubjection under man, and who for the moſt part are by nature weak in body, and thereby unable to put in execution the great affairs of a Kingdome, and unſetled in Judgement, and ſo hardly can determine that which is right, and ſettle themſelves thereupon: yet by the numeration of certain ill governing Queens, to conclude a generality againſt all government of women, is but an ill kind of arguing; for even by the like reaſon a man might conclude againſt Kings, of which ſort, although there have been many good, whom God hath uſed as inſtruments to work great good unto people in every Kingdome, yet more of them have been evill, as the Stories of every country will ſhew; and to abridge God of his power, that hee cannot as well governe by a woman as by a man, when it is his good pleaſure ſo to doe, were great injury to God, and a great diſcredit to all woman kind: but to return thither where I left.

In ſucceſſion of Kings a queſtion hath been, where the King hath had ſons both before hee came to the Kingdome and after, which of them is to ſucceed, hee that was born before the Kingdome, as having the prerogative of his birthright, or he that was born after, as being brought into the world under a greater planet than the other, neither hath there wanted reaſon or example for each ſide to found themſelves on: for *Xerxes* the ſon of *Darius* King of *Perſia* being the eldeſt birth

Herodot. lib. 4. Juſtin. lib 11. Plutarchus in vita Artaxerxis.

birth after his father was enthronized in the Kingdome, carried away the Empire thereof from his brother *Artemines* or *Artobazanes* born before his father came to the royall possession thereof: so *Arsaces* the son of another *Darius* born in the time of his fathers Empire carried away the garland from his brother *Cyrus* born before the Empire: so *Lewis* Duke of *Millan* born after his father was Duke, was preferred to the Dukedome, before his brother *Galliasius* born before the Dukedome. But these examples notwithstanding, and the opinion of sundry Doctors to the contrary, common use of succession in these latter dayes hath gone to the contrary, and that not without good reason: for that it is not meet, that any that have right to any succession by the prerogative of their birth-right (such as all elder brethren have) should be despoiled thereof except there be some evident cause of incapacity to the contrary.

Guicciard l. 1. Histor. Blondus Decad. 2. lib. 6. Mich. Ritius l. 2. de regib. Hungar. Sigeb. in Cronic.

Besides, sundry contentions have risen in kingdomes between the issue of the eldest Sonne of the King, dying before his father, and the second brother surviving the father, who should reign after the father, the Nephew challenging the same unto him, by the title of his fathers birth-right, and so by the way of representation; for the eldest Son, even the father yet living, bears the person of the father, how much then rather his father being dead? Whereupon the Law cals as well the Son *Filius familias* as the father *Paterfamilias*, for that the Sonne, even during the fathers life, is as it were Lord of his fathers state: the other claiming as eldest Son to his father

Bartol. l. si vivâ matre c. de bonis maternis primogenitis filii non excludunt secundogenitum in regno ff. de liberis & posthumis l. in suis.

father at the time of death; upon which title, in old time there grew a controverſy between *Areus* the ſon of *Acrotatus*, eldeſt ſon to *Cleomines*, King of *Lacedæmon*, and *Cleomines* ſecond ſon to *Cleomines*, and uncle to the ſaid *Areus*, but after debate thereof, the Senate gave their ſentence for *Areus* right, againſt *Cleomines*: beſides *Eunomus* King of *Lacedæmon* having two ſons, *Polydectes* and *Lycurgus*, *Polydectes* dying without children, *Lycurgus* ſucceeded in the kingdome, but after that he underſtood *Polydectes* widow had a childe, he yeilded the Crown to him: wherein he dealt farre more religiouſly than either did King *John*, who upon like pretence, not onely put by *Arthur Plantaginet* his eldeſt brothers ſon, from the ſucceſſion of the kingdome, but alſo, moſt unnaturally, took away his life from him; or King *Richard* the third, who moſt barbarouſly, to come unto the kingdome, did not onely ſlay his two innocent Nephewes, but alſo defamed his own mother, in publiſhing to the world, that the late King his brother, was a baſtard. Our Stories do not obſcurely note, that a controverſy of like matter, had like to have grown between *Richard* the ſecond and *John* of *Gaunt* his uncle, and that he had procured the counſell of ſundry great learned men to this purpoſe, but that hee found the hearts of ſundry Noble-men of the Land, (and ſpecially the Citizens of *London*) to be againſt him, whereupon hee deſiſted from his purpoſe, and acknowledged his Nephews right. Yet notwithſtanding, when as *Charles* the ſecond King of *Sicile* departed this life, and left behind him a Nephew of *Charles*

Parſanias lib. 3. Hiſtor.

Plutarch in vita Lycurg.

Viceriusin vita Hen 7.

his eldeſt ſon, ſurnamed *Martellus*, and his younger ſon *Robert*, and the matter came in queſtion which of them ſhould ſucceed, *Clement* the fifth gave ſentence for *Robert* the younger ſon of *Charles* deceaſed, againſt the ſon of *Martellus*, being Nephew to his Grandfather, and ſo cauſed the ſaid *Robert* to bee proclaimed King of *Sicile*; which was done rather upon diſpleaſure, that Pope *Clement* conceived againſt the Emperour *Frederick*, than that there was juſt cauſe ſo to do. And yet *Glanvill*, an old reverent Lawyer of this Land, and Lord chief Juſtice under *Henry* the ſecond, ſeemeth to make this queſtionable here in England, who ſhould be preferred, the Uncle or the Nephew.

Clem. c. paſtoralis de re judicata.

Glanvil. l. 7. c. 1.

And thus much of ſucceſſion of Kings, wherein the eldeſt among Males hath the prerogative, and the like in Females, if there be no Male: for that a Kingdome is a dignity undiviſible, and can come but to one, be hee Male or Female, for that otherwiſe great governments would ſoon come to ſmall Rules and Territories.

And the like that is ſaid of Kingdomes, is to be held of all Dignities under Kingdomes, where the eldeſt ſon is to be preferred before all his other brethren, and they ſucceſſively one before an other, if there be no iſſue left of them that go before; and the Male line is to be preferred before the Feminine, and the Feminine before all the reſt of the Kinred, ſo it be not a Maſculine Feud, and the ſame intailed upon the heir Male.

And thus far, as concerning the matters wherein the Civile Law dealeth directly or incidently within

within this Realme. Now it followeth, to ſhew how much of all thoſe Titles of the Canon Law, which have been before ſet down, are here in practice among us.

CHAP. II.

SECT. I.

Concerning the uſe which the Canon Law hath in this Realm: That ſome Titles thereof are aboliſhed onely individually, and ſome other are altogether.

OF thoſe Titles of the Canon Law, which before have been recited ſome are out of uſe here with us in the ſingular or *Individuum*, by reaſon of the groſſe Idolatry they did contein in them: as the Title of the Authority and uſe of the Pal, the Title of the Maſs, the Title of Reliques and the worſhip of Saints, the Title of Monks and Regular Canons, the Title of the keeping of the Euchariſt and Cream, and ſuch other of like quality: but yet are receined in the generall: for in ſtead of them, there are ſubſtituted in their places holy worſhips, tending to the like end of godlineſs thoſe other did pretend, but void of thoſe ſuperſtitious means the other thought to pleaſe God by; and ſo in ſtead of the Maſſe, hath come in the holy Communion; and in place of worſhipping of Saints, hath ſucceeded a godly remembrance, and glorifying of

God in his Saints, and so of the rest, whereof there is any right use within the Church.

Some other are out of use as well among the Civile as Criminall titles, because the matter that is therein treated of, is known notoriously to belong to the conusance of the Common Law at this day, as the Titles of Buying and Selling, of Leasing, Letting, and taking to Farme, of Morgaging, and Pledging, of Giving by deed of gift, of Detecting of Collusion and Cosenage, of Murder, of Theft, and receiving of Thieves, and such like.

CAP. II. SECT. II.

That the Titles lastly mentioned, did anciently belong unto the Court Spirituall, and the reasons which moved the Author so to believe: The first Reason.

AND yet, I doubt not, but even those matters, as well Civile as Criminall, or most of them, were anciently in practise, and allowed in Bishops Courts in this Land, among Clerks, to the which I am induced by three Reason: First, that I find not onely the forrein Authours of the Decretals, but also the domesticall Authours of the Legatines, being all most excellent wise men, as the Stories of their severall ages do report, to have enacted these several constitutions, and to have inserted them, not onely in the body of the Canon Law, but also in the body of the Ecclesiasticall Lawes of this Land, and that some wise men, sundry years after their ages, doe write and comment upon the same, as things ex-

expedient and profitable for the uſe of the Church, and the government of the Clergie in thoſe dayes; neither of which, I do preſume, they would have done, if in thoſe ages there had not been good uſe and free practice of them.

CAP. II. SECT. III.

The ſecond Reaſon.

SEcondly, that I finde in the Code of *Juſtinian*, by ſundry Lawes, ſome of his own making, ſome others of other Emperours before his time, even from the dayes of *Conſtantine* the great, Biſhops in their Epiſcopall audience had the practice of theſe matters, as well Criminall as Civile; and to that end had they their officials or Chancellours, whom the Law calleth *Eccleſieedici*, or *Epiſcoporum Ecdici*, that is, *Church-Lawyers*, or *Biſhops-Lawyers*, men trained up in the Civile and Canon Law of thoſe ages, to direct them in matters of judgement, as well in Eccleſiaſticall Criminall matters, as Eccleſiaſticall Civile matters.

And that theſe which now are Biſhops Chancellours, are the very ſelf ſame perſons in Office, that anciently exerciſed Eccleſiaſticall Juriſdiction under Biſhops, and were called *Eccleſiecdici*, it may appear by that which *Papias*, an old ancient Hiſtoriographer cited by *Gothofred* in his Annotations upon the foreſaid Law *Omnem* in the Code, and title *de Epiſcopis* and *Clericis*, and upon the §. *Praterea*, writeth of them, who ſaith thus, That *Eccliſiecdici*

or *Ecdici* were those that were aiders and assisters to the Bishops, in their Jurisdictions, not astrict or bound to one place, but every where through the whole Diocesse, supplying the absence of the Bishop, which is the very right description of the Bishops Chancellours that now are; who for that they carry the Bishops authority with them every where, for matters of Jurisdiction, and that the B. and they make but one Consistory, are called the Bishops Vicars generall, both in respect their authority stretcheth it self throughout the whole Diocesse, and also to distinguish them from the Commissaries of Bishops, whose authority is onely in some certain place of the Diocesse, and some certain causes of the Jurisdiction, limited unto them by the Bishops, and therefore are called by the Law, *Judices* or *Officiales foranei*, as if you would say, *Officiales astricti cuidam foro dioceseos tantùm.*

Gloss. in Clement 2. de Rescrip. Baldus l. aliquando ff. de officio Proconsulis. Covar. l. 3. variarum resolut. c. 10. num. 4. Sbrozius lib. 1. de vicario Epis q. 46. num. 24. 12. & 13.

So that it is a very meer conceit, that a certain Gentleman very learned and eloquent of late hath written, That Chancellours are men but of late upstart in the world, and that the sloth of Bishops hath brought in Chancellours, whereas in very deed, Chancellours are equall, or neer equall in time to Bishops themselves, as both the Law it self, and Stories doe shew: yea Chancellours are so necessary Officers to Bishops, that every Bishop must of necessity have a Chancellour, and if any Bishop would seem to be so compleat within himself, as that he need not a Chancellour, yet may the Archbishop of the Province wherein he is, compell him to take a Chancellour, or if he refuse so to do, put a Chancellour

cellour on him: for that the Law doth preſume, it is a matter of more weight than one man is able to ſuſtain to govern a whole Dioceſſe by himſelfe alone; and therefore howſoever the nomination of the Chancellour be in the Biſhop, yet his authority comes from the Law, and therefore he is no leſſe accounted an Ordinarie by Law, than the Biſhop is. But truth it is, not the ſloth of Biſhops, but the multitude and varietie of Eccleſiaſticall cauſes brought them in, which could not be defined by like former precedents, but needed every one almoſt a new deciſion. And the reaſons why Princes in the beginning granted to Clergie men theſe cauſes and their Conſiſtories, (for from Princes were derived in the begining all theſe authorities, as alſo the Religion it ſelfe is ſetled and protected in Kingdomes by Princes, before there can be had a free paſſage thereof) were; firſt that Clergie-men thereby might not be drawn from their prayer and exerciſe of divine ſervice, to follow matters of ſuits abroad. Secondly, that they were like to have a more ſpeedy and better diſpatch, and more indifferency before a Judge of their own learning, than before a Judge of another profeſſion; for this is true, and ever hath been, and I feare ever will be unto the end, that is ſaid in the Gloſſe, and is in common law, *Laici oppido ſemper infeſti ſunt Clericis*: Laſtly, the Clerks ſuits and quarrels ſhould not be divulged and ſpread abroad among the Lay people, and that many times to the great diſcredit of the whole profeſſion, ſpecially in criminall matters, wherein Princes anciently ſo much

Hoſtienſis in ſumma de officio Vicarii numero. 2. in fine nominationem ab Epiſc. poteſtatem vero à jure recipiunt.

much tendered the Clergie, that if any man among them had committed any thing worthy of death, or open ſhame, he was not firſt executed, or put to publick diſgrace, before he was degraded by the Biſhop, and his Clergie, and ſo was executed and put to ſhame, not as a Clerk, but as a Lay malefactor; which regard towards Eccleſiaſticall men, it were well it were ſtill reteined, both becauſe the conſideration thereof is reverent, and worthy the dignity of the Miniſtrie, whoſe office is moſt honourable, and alſo for that it is more ancient than any Papiſticall immunity is.

CAP. II. SECT. IV.

The third and laſt Reaſon.

THe third reaſon that moves me to believe, that theſe Titles ſometimes were here in exerciſe among us in Eccleſiaſticall Courts, is, that I find *Glanvill*, who himſelfe lived under *Henry* the ſecond, and was Lord chief Juſtice of England, in his dayes ſort to the Eccleſiaſticall Courts, the plea of Tenements, where the ſuit is between two Clerks, or between a Clerk and a Lay man, and the plea, is *De libera eleemoſina feodi Eccleſiaſtici, & non petitur inde recognitio*, whether the ſrank fee be lay or Eccleſiaſticall: where alſo is further added, that if it be found by the verdict of legall and ſufficient men, that it is Eccleſiaſticall fee, it ſhall not hereafter be drawn to Lay fee, no though it be held of the Church, by ſervices thereunto due and accuſtomed: ſecondly

Glanvill. l. 12. cap. 15. de Legibus Angliæ.

Idem lib. 13. cap. 25.

ſecondly, whereas land is demanded in marriage by the husband or the wife, or their heire, and the demand be againſt the giver, or his heire, then it ſhall be at the choice of the demander, whether he will ſue for the ſame in the court-Chriſtian, or in the ſecular Court: For ſaith he, it pertaineth to the Eccleſiaſticall Courts to hold plea of dowries, which he calleth *Maritagia*, if ſo be the plaintif ſo make choice of thoſe Courts, for the mutuall affiance that is there made between the man, and the wife, for marriage to be had between them, and there is a dowry promiſed unto the man by the womans friends, neither ſhall this plea be carried unto the temporall Courts, no though the lands be of Lay fee, ſo that it be certaine the ſuit is for a Dowry, but if the ſuit be againſt a ſtranger, it is otherwiſe: Againſt the Kings prohibition forbidding the Clergie the dealing in many things which are of Lay fee, forbids them no one thing that is of Eccleſiaſticall fee, and to ſhew the Princes meaning preciſely therein, that it was not his intent by that Prohibition to reſtrain the Eccleſiaſticall Judges for proceeding in matters of Eccleſiaſticall fee, he ſets down in very tearmes theſe words (Recogniſances touching Lay fee) as though he would hereby ſignifie to all men, that he would not touch matters of Eccleſiaſticall fee, which did then wholy and properly appertain to the triall of the Chriſtian Court, as hath been before vouched out of *Glanvill*, who for the place he then held, may be thought to have known the Lawes of England, as then they ſtood, and the right interpretation thereof, as well as any man then, or now

Idem l. 7. cap. 18.

Anno 24. Ed. 1.

now living. And yet becauſe there were ſome things of Lay fee, which the Clergie then had cognizance of, and as yet have in ſome meaſure, as cauſes, and matters of money, chattels, and debts, riſing out of Teſtaments, or Matrimonie, becauſe he would have whatſoever belonged to the Clergie to be undoubted, excepteth them from thoſe things which belong to the Crown and dignity, and leaveth them to the ordering of the Chriſtian Courts; which is nothing elſe but an affirmance of that which *Glanvill* and the reſt of the ancient Engliſh Lawyers, *Bracton* and *Britton* ſaid before.

Adde hereunto the provinciall Conſtitution *Æterna de pœnis*, made in the dayes of *Henry* the third, which plainly ſhewes, that in thoſe dayes all perſonall ſuits between either Clerk and Clerk, or between Lay men complaynants, and Clerkes defendants (for ever the Plaintife muſt follow the Court of the Defendant, which to the Eccleſiaſticall men then was the Eccleſiaſticall Court) were tryed by the Spirituall Law, and not by the Temporall Law: which practice for that it doth accord with the judgement of thoſe ancient Lawyers that have been before cited, and with the Prohibition it ſelf, which there reſtraineth only calling of Lay men to make recogniſances of matters of Lay fee; it may be a great argument, that theſe things were of the Eccleſiaſticall right in thoſe dayes: from which I ſee not how the Eccleſiaſticall Courts are fallen, for I ſee neither Law, nor ſtatute to the contrary, unleſs perhaps they will ſay the Statute of the 25. of *Henry* 8. *cap.* 19. took the ſame away, as being

25. H. 8. cap. 19.

hurtfull

hurtfull to the Kings Prerogative royall, and repugnant to the Lawes, Statutes and Cuſtomes of this Realme; which whether they be, or be not taken away by the ſtroake of that Statute, I leave it to men of better experience in theſe matters than my ſelfe to judge.

But yet this I find by experience to be true, That where there are two divers juriſdictions in one Common-wealth, unleſs they be careſully bounded by the Prince and an equall reſpect carried to both of them, ſo farre as their places, and the neceſſary uſe of them in the Common-wealth requires, as the advancement of the one increaſeth, ſo the practice of the other decreaſeth, eſpecially if one hath got the countenance of the State more than the other: which is the onely cauſe at this day of the overflowing of the one, and the ebbing of the other, but it is in his Sacred Majeſtie to redreſs it not by taking any thing from that profeſſion that is theirs, but by reſtoring to this profeſſion, that which is their own: but hereof σὺν θεῷ.

CAP. II. SECT. V.

That ſome titles of the Canon Law are granted to be of abſolute uſe with us, and that of ſome other there is queſtion made.

FOR the reſt of the matters that belong to the tryall of the Eccleſiaſticall Courts, ſome are acknowledged to be abſolutely in uſe, ſome others are challenged to be but in a certain meaſure in uſe.

In

In absolute use are those which never had any opposition against them, which almost are those alone which belong to the Bishops degree or order, for all things which come within the compasse of the Ecclesiasticall Law, are either belonging to the Bishops degree, or his jurisdiction: To his degree or order belong the ordering of Ministers and Deacons, the confirmation of Children the dedication of Churches and Churchyards, and such like, none of which have been challenged at any time to belong to any other Law. The second sort is of them that belong to the Bishops jurisdiction, which is partly voluntary, partly litigious: Voluntarie is, when those with whom the dealing is, stand not against it, but litigious it is when it is oppugned by the one part or the other; of this latter sort many things in sundry ages have been called in question, but yet rescued and recovered again by the wise and grave Judges themselves, who have found the Challenge of them to be unjust. But what doth belong to either of them in private, or what causes do appertain to the whole Jurisdiction in generall, because they have been already particularly set down by that famous man of worthy memory *Doctor Cosin*, in his learned Apologie for certain proceedings in Ecclesiasticall Courts; I will not make a new catalogue of them, but send the Reader for the knowledge thereof unto his Book; but yet in my passage will I note, which of them have been most chiefly oppugned, and as occasion shall fall out speak of them.

Cosin in his Apologie *part.* 1. *c.* 2.

PART. III.

CHAP. I.

SECT. I.

How the Juriſdiction which is of Civill and Eccleſiaſticall cogniſance, is impeached by the Common Law of this Land: and firſt of the impeachment thereof by the Statute of Præmunire facias.

AND thus much as concerning thoſe parts of the Eccleſiaſticall Law, which are here in uſe with us: Now it followeth, to ſhew whereby the exerciſe of that Juriſdiction which is granted to be of the Civile and Eccleſiaſticall cogniſance, is defeated and impeached by the Common Law of this Land, which is the third part of this diviſion.

The impeachment thereof is by one of theſe meanes by *Præmunire*, by *Prohibition*, by *Injunction*, by *Superſedeas*, by *Indicavit*, or *Quare impedit*: but becauſe the four laſt are nothing ſo frequent, nor ſo harmfull as the others, and that this book would grow into a huge volume, if I ſhould proſecute them all, I will onely treat of the firſt, and put over the reſt unto ſome better opportunity.

A *Præmunire* therefore is a writ awarded out of the Kings Bench, againſt one who hath procured out

What is a *Præmunire*.

out any Bull, or like proceſs of the Pope from *Rome*, or elſe where, for any Eccleſiaſticall place, or preferment within this Realm; or doth ſue in any forreine Eccleſiaſticall court to defeat or impeach any Judgement given in the Kings Court, whereby the Body of the offendor is to be impriſoned during the Kings pleaſure, his goods forfeited, and his Lands ſeiſed into the Kings hand, ſo long as the offender liveth.

25. *Ed.* 2. 27. *Ed.* 3. *c.* 1. 48. *Ed.* 3. *c.* 1. & 2. 7. *Rich.* 2. *cap.* 12. 13. *Rich.* 2. *c.* 2. 2. *H.* 4. *c* 3.

This writ was much in uſe during the time the Biſhop of *Rome's* authority was in credit in this land; and very neceſſary it was it ſhould be ſo, for being then two like principall authorities acknowledged within this land the Spirituall in the Pope, and the Temporall in the King; the Spirituall grew on ſo faſt on the Temporall, that it was to be feared (had not * theſe Statutes been provided to reſtraine the Popes enterpriſes) the ſpirituall Juriſ-

* Nevertheleſſe even out of theſe Statutes, have our Profeſſors of the Common Law wrought many dangers to the Juriſdiction Eccleſiaſticall, threatning the puniſhment conteined in the Statute Ann. 27. *Edw.* 3. & 38. *ejuſdem*, almoſt in every thing that the Court Chriſtian dealeth in, pretending all things dealt within thoſe Courts, to be the diſheriſon of the Crown (from the which and none other fountaine, all Eccleſiaſticall Juriſdiction is now derived) whereas in truth Sir *Thomas Smith* ſaith very rightly and charitably, that the uniting of the Supremacie Eccleſiaſticall and Temporall in the King, utterly voideth the uſe of all thoſe Statutes: (*Nam ceſſante ratione, ceſſat lex*) and whatſoever is now wrought or threatned againſt the Juriſdiction Eccleſiaſticall, is but in emulation of one Court to another, and by conſequent a derogation of that authority from which all Juriſdiction is now derived, and the maintenance whereof was by thoſe Princes eſpecially purpoſed. D. *Cowel* in the Interpreter.

diction

dition had devoured up the temporall, as the temporall now on the contrary ſide hath almoſt ſwallowed up the ſpirituall. But ſince the forreln aurhority in ſpirituall matters is aboliſhed, and either Juriſdiction is to be agniſed to be ſetled wholy, and onely in the Prince of this Land, ſundry wiſe mens opinion is, there can lie no *Præmunire* by thoſe Statutes at this day, againſt any man exerciſing any ſubordinate Juriſdiction under the King, whether the ſame be in the Kings name, or in his name who hath it immediately from the King: for that now all Juriſdiction, whether it be Temporall or Eccleſiaſticall is the Kings, and ſuch Eccleſiaſticall Lawes as now are in force are the Kings Eccleſiaſticall Lawes, and the Kings Eccleſiaſticall Courts; for that the King cannot have in himſelfe a contrarie of Juriſdiction fighting one againſt another, as it was in the caſe between himſelf and the Pope, though he may have diverſity of Juriſdiction within himſelfe, which for order ſake, and for avoyding of Confuſion in government he may reſtrain to certaine ſeverall kindes of cauſes, and inflict puniſhment upon thoſe that go beyond the bounds or limits that are preſcribed them: but to make them as enemies, or underminers of his ſtate, he cannot; for the queſtion here is not, who is head of the cauſe, or Juriſdiction in controverſie, but who is to hold plea thereof, or exerciſe the Juriſdiction under that head, the Eccleſiaſticall or Temporall Judg. Neither is that to move any man that the Statutes made in former times againſt ſuch proviſors, which vexed the King and people of this

land with such unjust suits, do not onely provide against such proceſs as came from *Rome*, but against all others that came elsewhere, being like conditioned as they: for that it was not the meaning of those Statutes, or any of them, thereby to tax the Bishops Courts, or any Consistorie within this land, for that none of them ever used such malepert sawcinesse against the King, as to call the Judgements of his Courts into question, although they went farre in straying upon those things and causes which were held to be of the Kings temporall cognisance, as may appeare by the Kings prohibitions thereon framed. And beside the Arch bishops, Bishops and other Prelates of this Land, in the greatest heat of all this businesse, being then present in the Parliament with the rest of the Nobility, disavowed the Popes insolencie toward the King in this behalfe, and assured him that they would and ought to stand with his Majestie against the Pope, in these and all other cases touching his Crown and Regalitie as they were bound by their allegiance: so that they being not guilty of these enterprises against the King, but in as great a measure troubled in their own jurisdiction by the Pope, as the King himself was in the right of his Crown, as may appear out of the course of the said Statutes. The word (*Elsewhere*) can in no right sense be understood of them, or in their Consistories: although some of late time thinking all is good service to the Realme, that is done for the advancement of the Common Law, and depressing of the Civile Law, have so interpreted it, but without ground

Et le estat est (in Curia Romana vel alib.) le quel (alibi) est à entender en la Court P Eues que si sint que si homme fort sue la pur chose que appent al Commen ley, il awa Præmunire. Fitzherb. Nat. Bre. Tit. Præmunire facias.

bast

ground or warrant of the Statutes themſelves, who wholly make proviſion againſt forreine authority, and ſpeak no word of domeſticall proceedings. But the ſame word (*Elſewhere*) is to be meant and conceived of the places of remove the Popes uſed in thoſe dayes, being ſometimes at *Rome* in *Italy*, ſometimes at *Avignion* in *France*, ſometimes in other places, as by the date of the Bulls, and other proceſs of that age may be ſeen; which ſeverall removes of his gave occaſion to the Parliament of inſerting the word (*Elſewhere*,) in the body of thoſe Statutes, that thereby the Statutes providing againſt Proceſs dated at *Rome*, they might be eluded by like Proceſs dated at *Avignion*, or any other place of the Popes abode, and ſo the penalty thereof towards the offendor might become void and be fruſtrated. Neither did the Lawes of this Land at any time whiles the Popes authority was in his greateſt pride within this Realm, ever impute a *Præmunire* to any Spirituall Subject, dealing in any Temporall matter, by any ordinary power within the Land, but reſtrained them by Prohibition onely, as it is plain by the Kings Prohibition, wherein are the greateſt matters that ever the Clergie attempted by ordinary, and domeſticall authority, and yet are refuted onely by Prohibition. But when as certaine buſie-headed fellowes were not content to preſs upon the Kings Regall juriſdiction at home, but would ſeek for meanes, for preferment, for forrain authority, to controule the judgements given in the Kings Courts by proceſs from the Pope; then were *Præmunires* decreed,

both to punish those audacious enterprises of those factious Subjects and also to check the Popes insolencie, that he should not venture heareafter to enterprise such designments against the King and people. But now, since the feare thereof is past, by reason all entercourse is taken away between the Kings good Subjects and the Court of *Rome*, it is not to be thought, the meaning of good and mercifull Princes of this Land is, that the cause of these Statutes being taken away, the effect thereof should remain; and that good and dutifull Subjects stepping happily awry in the exercise of some part of their Jurisdiction, (but yet without prejudice of the Prince, or his Regall power) shall be punished with like rigour of Law, as those which were molesters, grievers, and disquieters of the whole estate But yet notwithstanding the edge of those *Praemunires* which were then framed, remain sharpe and unblunted still against Priests, Jesuits, and other like Runnagates, which being not content with their own naturall Princes government, seek to bring in again, that and like forrein authoritie, which those statutes made provision against; but these things I leave to the reverend Judges of the Land, and others that are skilfull in that profession, onely wishing that some which have most insight into these matters, would adde some light unto them, that men might not stumble at them, and fall into the danger of them unawars: but, now to Prohibitions.

CAP.

CAP. I. SECT. II.

The impeachment thereof by Prohibition and what it is.

A Prohibition is a commandement ſent out of ſome of the Kings higher Courts of Records, where prohibitions have been uſed to be granted in the Kings name, ſealed with the ſeale of that Court, and ſubſcribed with the Teſt of the chiefe Judge, or Juſtice of the Court, from whence the ſaid prohibition doth come at the ſuggeſtion of the Plaintif, pretending himſelf to be grieved by ſome Eccleſiaſticall or marine Judge, in not admittance of ſome matter, or doing ſome other thing againſt his right, in his or their judiciall proceedings, commanding the ſaid Eccleſiaſticall or marine Judge to proceed no further in that cauſe: and if they have ſent out any cenſure Eccleſiaſticall or Marine againſt the Plaintif, they recall it, and looſe him from the ſame, under paine of the Kings high indignation, upon pretence that the ſame cauſe doth not belong to the Eccleſiaſticall or Marine Judge; but is of the temporall cogniſance, and doth appertaine to the Crown and dignitie.

Of *Prohibitions*, ſome are Prohibitions of *Law* ſome other are Prohibitions of *fact*.

What are Prohibitions of Law

Prohibitions of Law, are thoſe which are ſet down by any Law or Statute of this Land, whereby Eccleſiaſticall Courts are interdicted to deale in the matters therein contained, ſuch as are all thoſe things which are expreſſed in the Kings Prohibition as are alſo thoſe which are mentioned

by the second of *Edward* the sixth where Judges Ecclesiasticall are forbid to hold plea of any matter contrary to the effect, intent, or meaning of the Statute of *W.2. Capite* 3. The Statute of *Articuli Cleri*, *Circumspecte agatis*, *Sylva Cadua*, the treaties *De Regia Prohibitione*, the Statute *Anno* 1. *Edwardi* 3. *Capite* 10. or ought else wherein the Kings Court ought to have Jurisdiction.

Prohibitions of fact, are such which have no precise word, or letter of Law, or Statute for them as have the other, but are raised up by argument out of the wit of the Deviser. These for the most part are meer quirks and subtilties of law, and therefore ought to have no more favour in any wise, honourable, or well ordered Consistorie, than the equity of the cause it selfe doth deserve, for such manner of shifts (for the most part) breed nought else but matter of vexation, and have no other commendable end in them, though they pretend the right of the Kings Court, as those other Prohibitions of the Law do: but the Kings right is not to be supposed by imagination, but is to be made plaine by demonstration, and so both the Statute of the 18. of *Edward* the third *capite* 5. is, where it is provided, that no Prohibition shall goe out, but where the King hath the cognisance, and of right ought to have; and also by the forenamed Statute of *Edward* the sixth, which forbids that any Prohibition shall be granted out, but upon sight of the libel, and other warie circumstances in the said Statute expressed: by which it is to be intended the meaning of the Law-givers was not,

that

that every idle ſuggeſtion of every Attourny ſhould breed a Prohibition, but ſuch onely ſhould be granted as the Judge in his wiſdome ſhould think worthy of that favour, and if right and equitie did deſerve it: although (as I muſt needs confeſs) the Statute is defective in this behalf, for to exact any ſuch preciſe examination of him in theſe caſes, as it is alſo in other points, and is almoſt the generall imperfection of all Statutes, that are made upon Eccleſiaſticall cauſes: but I feare me as emulation between the two Lawes, in the beginning, brought in theſe multitudes of Prohibitions, either againſt or beſide law, ſo the gaine they bring unto the Temporall Courts maintaineth them: which alſo makes the Judges they ceſſe not coſts and damages in caſes of conſultation, (although the Statute preciſely requires their aſſent and aſſignment therein) becauſe they would not deterre other men from ſuing out of Prohibitions, and purſuing of the ſame.

The Prohibitions of the law, as have been before ſhewed are neither many nor much repined at becauſe they containe a neceſſary diſtinction between Juriſdiction and Juriſdiction, and imply the Kings right, and ſubjects benefit: but the Prohibitions of fact or of men, are both infinite and odious for that there is, well nigh, no matter either Civile or Eccleſiaſticall, be it never ſo cleer or abſolute, but they clog and incumber it with ſome Prohibition; and the matter they contain is (for the moſt part abſurd and frivolous: as ſhall firſt appear in *marine cauſes*, and after in *Eccleſiaſticall matters*.

CAP.

CAP. I. SECT III.

Concerning the common Lawyers action of Trover, and what is meant in the Law by a Fiction, to shew, how the Civile Jurisdiction is impeached in matters of Admiraltie.

FOR Marine causes it is well known, that all such bargaines and contracts, or as it were contracts as are made by any persons either in any forraign country, or any haven or creek of the Sea, or any shore thereof, as farre as the greatest winter wave doth run out, or upon any great river, to the first bridge next to the Sea, for any merchandize, ship, tackle, or other negotiation belonging to the Sea, or to any merchandize brought from beyond the Sea, are and ought to be of the admirall cognizance, and so evermore have been since the Court of the Admiraltie was first erected: and yet the common Lawyers (to defeate the Civile Law of the triall thereof) have devised sundry actions, and among the rest an action of Trover, whereby they faign that a ship arrived in *Cheapside*, or some other like place within the Citie, and there the Plaintif and Defendant meeting together, bargained upon some merchandize, or other like seafaring matter, by which fiction, they pretend the bargaine now is to be tryed in the Common Law, and not by the Civile Law, as being done in the body of a Countie, and not upon the maine Sea, or any other place subject to the Admirall jurisdiction.

But

But, that this fiction, or any other like qualified to this, ſhould have any ſuch force, as to work any effect in Law, I will ſhew it unreaſonable firſt by the definition of a fiction, then by thoſe things that are neceſſarily attendant thereon.

A *fiction* therefore is defined by *Bartol* (whom alſo the reſt of the Doctors do follow) to be an *aſſumption of the Law upon an untruth, for a truth, in a certain thing poſſible to be done, and yet not done*: upon which fiction the Doctors hold, there waite two things, the one is *Equity*, the other *Poſſibility*. For Firſt, unleſſe there be cauſe why, that which is not, ſhould be faigned to be, and that which is, ſhould bee accounted not to be, and that which is, done in one ſort, or at one time, or in one place, ſhould be imagined to be done in an other ſort, at an other time, and in an other place, there is no reaſon a fiction ſhould be admitted: for the Law alloweth no man to come to extraordinary remedies, but where ordinary remedies fail: and therefore if that which is in controverſy may bee obtained by any other meanes, than by a fiction, a fiction is not to be afforded: but if ordinary meanes cannot be had, then fictions may be entertained to ſupply the defect of the ordinary means, that thereby, although the truth be otherwiſe, yet the effect of the Law may be all one.

L. ſi is qui pro empto-re §. 3. ff. de uſucapionib. & ibi Bartol.

L. in cauſa. ff. de minorib.

So then, the Law faigneth an infant not yet born, to bee born for his benefit, for that happily without that fiction, the poor infant ſhould be remedileſſe of his Filiall Portion, Legacie, or other right in conſcience due unto him; ſo Nephewes and Neeces ſuc-

L. qui in utero & penult. de ſtatu hominis ff.

succeed together with their Uncles and Aunts in their Grandfathers and Grandmothers goods, for such portion as should have come to their parents, if they had lived, for that the Law presumeth them to represent the person of their parents, so he that is dead, is faigned to bee alive to many constructions in Law, specially if many of his equals in age be alive, at the time that he is faigned to bee alive: so he that is alive, and is in captivity, (for the upholding of his Will which he made in liberty) is faigned to bee dead the houre before hee became captive: so he that is obstinate, and will not appear in Judgment, being lawfully called thereto is faigned to bee present, that neither himself should take benefit out of his obstinacy, neither his adversary hurt by his absence and injury. Infinite more examples might be brought of this sort, but it would be too long to run through them all, and this shall suffice to have shewed, that the Law approveth fictions, but where there is equity for it, and the Law it self otherwise cannot have her effect. And as the Law cannot proceed to a fiction without equity, so neither can it faign any thing that is impossible, for Art evermore followeth Nature; and therefore if a man would faign disproportionable things such as the Painter did in *Horace*, who made Boares wallow in the waves of the Sea, and Dolphins wander in the woods; these fictions in no sense can be admitted for that they are such, as neither Nature nor Reason can brook. In like sort, if a man would faign one to

L. 1. §. si filius ff. de suis & legit l. 2, l. 3 l. 4. C eod. l. Gallus 29. §. & bene & § videndum ff de liberis & posthumis. §. cum filius Instit. de hæred. an ante nato. L. veris est §. ult. ff. pro socio. L. actione § publicatione ff. cod. L. absentem. ff. de verborum significat. L. lege Cornel. ff de testamento. L. Gallus § si ejus ff. de liberis & posthumis. l. si pater § si cum. ff de adopt. Horat. de Arte poëtica. Bartol l. si is qui pro emptore num 21. 22. 23. & sequent.

to live, who were dead two hundred years ſince, ſo that it were not poſſible that hee or any of his equals ſhould live at that age; this would not hold in Law, for that it is above the age that the Law doth preſume any man may live by Nature; although the Law doth preſume ſuch as dye in warre for defence of their countrey (for the better encouragement of thoſe that are alive, to venture themſelves in like ſervice for the common-wealth) to live for ever; becauſe their fame doth flouriſh for ever; and upon like reaſon the Law will not ſuffer any perſon to adopt an other for his childe, who is either elder or equall in age unto himſelf, or is not ſo farre under his years, as by courſe of Nature hee might be his naturall childe indeed: ſo much the Law deteſteth impoſſibilities, that it will not ſuffer a man to faign that which in common Senſe and Nature might not be true indeed.

Now, if theſe things be true, as in all reaſon and ſhew, by former precedents they appear to be true, I would gladly ſee how actions of Trover, (whereby the Common Lawyers tranſlate unto themſelves matters of Marine triall) if they be ſquared to theſe Rules of Fictions, can bee maintained: for firſt to ſpeak of equity, which the Law requires in theſe manner of proceedings, what equity can it be to take away the triall of ſuch buſineſs as belongeth to one Court, and to pull it to an other Court; ſpecially, when as the Court from whence it is drawn, is more fit for it, both in reſpect of the fulneſs of knowledge that that Court hath to deal in

ſuch

such businesse, and also of the competency of skill, that is in the Judges and Professours of those Courts, correspondent to these causes, more than is in the Judges and Professors of the other Courts, for the deciding and determining of these matters. For, albeit otherwise they are very wise and sufficient men in the understanding of their own profession, yet have they small skill or knowledge in matters pertaining to the Civile profession: for that there is nothing written in their Books of these matters, more than is to be gathered out of a few Statutes of former time, whose drift was not to open any door unto them, to enter upon the Admirall profession, but to preserve the Kings Jurisdiction from the Admirall incroachment, as may by the said Statutes appear; whereas contrarily, the Civile Law hath sundry titles included in the body thereof, concerning these kindes of causes; whereupon the Interpreters of the Law have largely commented, and others have made severall Tractates thereof: So that, by all likelihood, these men are more fit and better furnished to deal in this businesse, than any man of any other profession, as having, besides the strength of their own wit, other mens helpes and labours to rely upon.

Besides, this businesse many times concerns not only our own countrey-men, but also strangers, who are parties to the suit, who are born, and doe live in countries ordered by the Civile Law, whereby they may bee presumed to have more skill and better liking of that Law, than they can bee thought

thought to have of our Lawes, and our proceedings: and therefore it were no indifferency to call them from the triall of that Law, which they, in ſome part know, and is the Law of their countrey (as it is almoſt to all Chriſtendome beſides) to the triall of a Law which they know in no part, and is meer forrain unto them; ſpecially when the Princes of this Land have anciently allowed the Civile Law to be a Common Law, in theſe cauſes, as well to their own ſubjects, as it is to ſtrangers.

Further, the avocating away of cauſes in this ſort from one Juriſdiction to an other, ſpecially when the cauſe hath long depended in the Court from whence it is called, inſomuch as now it is ready for ſentence, or rather is paſt ſentence, and ſtands at execution, cannot be but great injury to the ſubject after ſo much labour loſt, and money ſpent in waſte, to begin his ſuit anew again: which is like to *Siſyphus's* puniſhment, who, when he hath with all his might, forced his ſtone up to the top of the hill, and ſo is (as himſelf hopes) at an end of his labour; yet the ſtone rowles down again on him, and ſo his ſecond labour (his ſtrength being ſpent with the toyle of the firſt) is more grievous than the former was: which being ſemblably true in a poor Clyent, who hath his cauſe in hearing, there can be no equity in this fiction, whereby a cauſe ſo neer ended, ſhould again be put upon the Anvill, as though it were ſtill rough work and new to be begun.

And ſurely, as there is no equity in it, ſo there is no poſſibility ſuch a fiction ſhould be maintained by

by Law; for that it hath no ground of reason to rest his feet on. For if this be granted, that such a fiction by Law may be made, then one of these absurdities must needs follow, either that a ship may arrive in a place where no water is to carry it, or if that it arrive according to the fiction, either the people, their houses and their wealth shall be all overwhelmed in the water, as the world was in *Noahs* Flood, and *Deucalions* Deluge, and so no body there shall be left alive to make any bargain or contract with the Mariners and Shipmen that arrive there, or that the people that dwell there shall walk upon the water, as people doe on land, which *Peter* himself was not able to doe, but had sunck, if Christ had not reacht his hand unto him, and therefore far lesse possible for any other man to do. So that it may bee well said (these things standing as they doe) no such fiction can hold, and that no action can be framed upon it; for as there is no Obligation of impossible things, so there is no Action of things that neither Nature nor Reason will afford to be done: neither is it to the purpose that the maintainers of these actions do say, that in this case, the place where the contract is made is not considerable, which I take to be farre otherwise, for that, when that themselves will convey a Marine cause from the Sea unto the Land, they will say it to bee done in some speciall place of a Country, bee the place never so unproper for such an action: for that the foundation of these actions, is the place where they were done, as namely that they were done in the body of such a Country, or such a

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Country, and not upon the main Sea, or beneath the loweſt bridge, that is upon any great river next the Sea. And therefore in two emulous Juriſdictions, when they are ſo divided, as that one is aſſigned the ſea, the other the land, the place of the action can in no ſort be ſuppreſſed, and another ſupplyed in the room thereof: *Quod enim una via prohibetur, alia via non eſt permittenda, & quod prohibitum eſt directo prohibetur etiam per obliquum:* for if this were granted, then matter enough would bee offered to one Juriſdiction to devour up the other, and the Law would be eaſily eluded: which, to reſtrain either of theſe Juriſdictions to their own place, and to provide that one in his greatneſs do not ſwell up againſt the other, hath ſet either of them their bounds and limits which they ſhall not paſſe: which, as it is the good proviſion of the Law, ſo ought either Juriſdiction in all obedience to ſubmit it ſelf thereunto, for that the diminiſhing of either of them is a wrong to the Prince from whom they are derived, who is no leſſe Lord of the Sea, than hee is King of the Land: and therefore, in no ſort, ſuch liberty muſt be allowed to the one directly or indirectly, as that it ſhould be a ſpoil unto the other; which would eaſily come to paſſe, if when as the Law alloweth not any man to ſue a Marine matter by the ordinary courſe of the Lawes of this Land, yet a man will follow it by an extraordinary. But where there is an uniformity of Juriſdiction, as that it is all by ſea and all by land, there may a thing be fained to be done in one place, that was done in another place without any mans

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prejudice, for that in this case the place is not traversable (so it bee not in Criminall matters where time and place is required, that the accuser do not wander from place to place with the injury of the accused) for howsoever the place and the action is altered, yet the truth of the cause remaineth one and the self same still. And so farre as concerning actions of Trover in Admirall causes: Now it doth follow, that I should speak of like prejudices that grow to the same by actions of Trespass, but those will I passe over, for that in so small a Treatise as this is, I cannot goe over all: and therefore will I only put the Reader in mind, that there are more devises, rising out of the Common Law than one, that infest the Admiralty. But now to Wils and Testaments wherein they are impeached.

CAP. I. SECT. IV.

Concerning Wils and Testaments, wherein they are impeached.

FOr matters of Wils and Legacies, they are so proper to the triall of the Ecclesiasticall Law of this Realm, that the professors of the Common Law themselves, doe oftentimes confesse and say, they have no more to do therewith, than the Civilian hath to do with the knowledge of the matters of Franktenement: and yet even these matters of Testaments and Legacies, although Prohibitions be not so frequent in them, as they are in the rest of

Eccle-

Eccleſiaſticall cauſes, yet they are not quite voide of them, and that in ſome points, wherein the very life and effence of a Will doth ſtand.

For whereas the ancient *Romans*, knowing how ſubject matters of Wils are to forgery and corruption on the one ſide, and ſuppreſſion and concealment on the other ſide, to meet with all craft and ſubtilty whatſoever, which might ſeize on them, did moſt carefully provide, that there ſhould be ſeven witneſſes at the leaſt, preſent at the making of every Will and Teſtament, except it were in time of ſome generall plague or ſickneſs, when ſo many witneſſes could not conveniently be had together, for fear of infection, or that it were in the Country, where there are but a ſmall multitude of people. And that thoſe witneſſes ſhould be particularly required to that purpoſe, with diverſe other obſervations & circumſtances tending all to the ſafe and ſure making thereof; which the Eccleſiaſticall Law altered afterward in ſundry points, for that many true Wils were many times overthrown for want of thoſe preciſe ſolemnities. It therefore reduced the whole number of thoſe ſeven witneſſes, unto two only, agreeably to the Law of God, and the Law of Nations, where that number of witneſſes is allowed, as competent to prove any matter, ſo that the ſame witneſſes be honeſt and credible perſons, ſuch whoſe faith is not doubted of. The common Lawyers, becauſe themſelves in ſundry matters very dangerouſly many times admit one witneſs, and give him full credit, and that in matters of great weight and importance, (as though all ſhould bee ſquared to

their rule, and framed to their compass) if an Ecclesiasticall Judge in the probate of a Will, contrary to the rules of his own Law, will not admit the testimony of one witnesse, they forthwith fling out a Prohibition against him, as though he had done an offence against the Crown and dignity, in that he doth not allow those number of witnesses in the Probate of a Will, that the Common Lawes of this land allow almost in every matter.

For answer to which, if I should alleage the precise forme of the Ecclesiasticall Law, which to the essence of a Will requireth this number of two witnesses, or else holdeth it not for a Will (but in cases *inter liberos, & ad pios usus*, where the only hand of the Father or Testator without witnesses serveth for a Will, so the same be known to be the Testators own hand, or so proved by comparison) I would think to wise men I had said sufficiently; but I will not rest hereupon, but will convince themselves by themselves: for, doe they, I pray you, in their own proceedings, where a law or Statute requires more witnesses than one, content themselves with one witnesse alone; yea, doe they not in all cases where a certain number of witnesses are appointed to prove a fact by Law or Statute, furnish the cause with so many witnesses as the case desires, or else do they not account the proceeding voide? And will they think themselves so precisely bound to the keeping of the letter of the Common Law, and will they not suffer the Civilian in like manner, to cleave fast to the observation of the Civile Law, especially when it hath the consent of the Law of

God,

God, and the Law of Nations, and is his Majeſties Eccleſiaſticall Law of this Land, aſwell as the other is his Temporall Law of the ſame?

I confeſſe it may be true many times, which one man ſaith, ſpecially when there concurre therewith many great and violent preſumptions, and the party that reporteth it is of good credit; but dangerous it is to open this gap to the malice of men, for even ſo, many things ſhall be obtruded to the Judge for trueth, which are ſtarke lyes, and many things ſhall bee prerended to bee gold in ſhew, which in proof and practiſe will be found to be no other thing, but meer droſſe. And therefore well decreed the Emperour *Conſtantine*, that no one mans teſtimony ſhould bee heard, though he were never ſo great a man in Court. *L. juris jurandi. § Simili C. de Teſtibus.*

But perhaps ſome man will ſay, If credit ſhall not be given oftentimes to one mans teſtimony, much wickedneſs will paſs away unpuniſhed: For reply to which I anſwer, It is better to let a bad man ſcape, than to puniſh a good; and although it be true if a man may excuſe himſelf by deniall, no man will be found guilty; ſo alſo it is true on the other ſide, if it be enough to condemnation to be charged by one man alone, without any other witneſſes, no man ſhall bee innocent; and therefor the admittance of one witneſſe in cauſes, and the proceeding thereupon to judgement is very dangerous

An other like barre to this they lay againſt Eccleſiaſticall proceedings in matters of Teſtament; whereas an Eccleſiaſticall Judge proveth a Will, wherein are Mannors, Lands, Tenements, and other

like Hereditaments bequeathed, challenging this also to be of the Crown and dignity, as though the Eccleſiaſticall Judge thereby took upon him to decree which lands were deviſable by Will, and which not, or would by his probate adde a ſtrength unto the Will, to make the deviſe good or bad, whereas on the contrary part, the Eccleſiaſticall Judge by this act doth only teſtify, that ſuch a perſon made ſuch a Will, and that the ſame was proved before himſelf under his Teſte, for his laſt Will and Teſtament: but for the validity of the Will it ſelf, and the Legacies and deviſes therein, whether they were of lands or tenements, or of goods or chattels, the Probate it ſelf worketh nothing, but leaveth that to the Law, Common or Eccleſiaſticall, according as the bequeſt belongeth to either of them, whether it be good and vailable in Law, or no: for it oftentimes falleth out, notwithſtanding the Will be lawfully proved before the Ordinary, yet the bequeſts are not good, either in reſpect of the perſon to whom the bequeſts are made, or in reſpect of the thing that is not deviſable in all, or in part; as by the Common Law, lands in *Capite* cannot be deviſed, more than for two parts, but in Socage the deviſe is good for all; and by the Cuſtome of the City of *London*, and ſome other places of the Land, a man can bequeath no more than his deaths part, and if hee do, his bequeſt is void for the reſt; but in other places of the land a man may bequeath all. By the Civile Law a man can bequeath nothing to a Traytor, or an Heretick, or an unlawfull Colledge, or Company (unleſſe perhaps it be for the aliment

alimcnt, or maintenance of them in extream poverty, that they die not for hunger, which is the work of charity) and if he do, the legacie thereof is void to all intents and purpoſes. So then, the Probate of the Ordinary in matters of land, neither helpeth, nor hindereth the right of the deviſe it ſelf, but is a declaration onely of the dead mans doom uttered before ſuch and ſuch witneſſes: which taketh his ſtrength not ſo much from the Probate, as from the Law, and is teſtified onely by the Probate, that the ſame was declared by the Teſtator, in the preſence of the witneſſes therein named, to be his true and laſt Will, So that no man herein is to be offended with the Ordinary, as preſuming of a matter not appertaining unto him, (for his teſtification in all Law and conſcience doth belong unto him, to give allowance ſo farre unto the defuncts Will, as it is avouched before him to be his laſt act and deed in that behalf) but rather they are in this caſe to thank the Ordinary, that he by that act of his hath preſerved the memory of that, which otherwiſe perhaps would have been loſt and periſhed, to the great hurt of the Common-wealth, and others which have private intereſt therein.

CHAP. II.

SECT. I.

Of the Care that Princes of this Realm have had for the due payment of Tythes unto the Church, and the preserving of the cognisance thereof unto the Ecclesiasticall Courts of this Land, both before the Conquest and since.

OF all matters that appertain to the Ecclesiasticall Courts, there is no one thing that the Princes of this Land have made more carefull provision for, since there was any Church government in this Land, than that all manner of Tythes due by the word of God should bee fully and truely paid unto their Parish Churches where they grew; & if they were denied, should be recovered by the Law of the Church. *For first before the Conquest, King *Æthelstane* made a Law, that every man should pay his Tythes to God, in manner as *Jacob* did, who made a vow to God, If God would bring him back again to his Country, hee would

* The great pietie and Princely care of our ancient Kings before the

Conquest is worthily noted by the Author, and because it argueth the rare devotion of those times, we will consider it more perfectly. About the 7th Centurie *Ina* King of the West Saxons made this Law: Cyric ſceattaſ ſyn agifene be deint manðyneſ mæſſan Gode to ðæne gelæſte, ſy he ſceyloig ſeopentig ſcill. 7 be ðpelſcealdum agyfe ðone cyricſceat: that is, That the Church sceat be paid in at *Martlemas*, if any refuse to pay it, that his penaltie be forty shillings, and the payment of Church-sceat twelve times.

That

That which the Law here calleth Church ſceat, according to the varietie of reading, hath been diverſly interpreted. *Fleta* as if it were cyricræð, readeth Church-ſeed, and therefore he ſaith, it was *Certa menſura bladi Tritici. &c.* So the old Lawyer in *Lambert. fuit un certein de ble batu que cheſcun homme devoit en temps des Briton & des Engles porter à lour Egleſe le jour S Martin.* Others read Cyricſceat, Church-ſcet; that is the Church-ſhot, or Church due, Which way ſoever we read the word, there will be no great injurie done to the ſence; yet becauſe other things beſides Corne have gone under the name of Church-ſceat (as the Cocks and Henns at *Chriſtmas*) therefore it ſeemeth that the laſt reading is the beſt: here it muſt ſignifie a quantitie of Corne due to the Church, and to be paid in at *Martlemas:* Why theſe dues and othes were tendred at this Feaſt, *Hoſpinian* thinketh he hath given a good reaſan, but ſee *Gretſer* in his book *de Feſtis* upon S. *Martins* day.

In the ninth Centurie King *Æthelſtane* made this Law. Ic Æþel ſtane cyning mid gehadre ſylfhelmes mines hehbiſceopes Johham mra biſcopa bebeode ealdum minum geneatum þurh ealle mine piceon þæs ðinh tænes nama Jealra halgena Jron mine luſu þ hi ænoſt mines agenes æhtes ðam teoþe gerylleþ gehæt libbendes unrer ge þer geaplices ſeſtmes: that is, I *Æthelſtane* King, by the advice of *Wulfhelme* my Archbiſhop, and my other Biſhops, command all my Reves through all my Kingdome in the Lords name, and of all Saints; and for my love that in the firſt place they pay the Tyth of my own revenues, as well the living Cattle as the yeary frutes: Jþæs ſie to þæm dæg þæn beheafdunges Seint Johones þæs ſulhtenes: that is, And this to be done at the day of the beheading of S. *John* the Baptiſt. And that the Subject might the more earneſtly intent the obſervation of this Law, the King addeth a pious exhortation: Utan gehencan þe hpæt Jacob ſe hiehfæder to þam ðinhten cweþ, ic þe pille gefillan mine teoþan, J mine ſiblac And ðinhten ſeolfe onðam godſpel cwæþ Eallum þæm hæbbendum monſceal agyfan J hi genyhtſumiaþ ſe moton eac hæf þencan þe egeſlic on þiſſum tocum iſ gepriten Gif þe

use

ure teoðan ȝefyllan nyllaþ ur ða nyȝon ðæla ſ bi æ-
bpæðene ȝ ſe teoþa an ur biþ to laſ: ðe ȝoðcunde lane ur
ȝemynaþ ſ ſe ða heoſonlica ðinȝa miþ ðam eoſplicum
ȝ ða eccle: miþ ðam hpilpendicum ȝeeap miaþ: that is, Furthermore, think we with Our ſelves what *Jacob* the High Father to the Lord ſaid: I will give thee my Tythe and my peace offering. And the Lord himſelfe in the Goſpel ſaith, To all that have, it ſhall be given and they ſhall abound. We might alſo bethink our ſelves of the penalty which is written in this Book, that if we will not pay our Tythes, then the nine parts ſhall be taken away, and the tenth onely ſhall be left us. And gods Lore putteth us in minde, that for theſe earthly things eternall are to be had, and everlaſting for the tranſitorie.

Thus the religious Prince goes on, and earneſtly purſues the argument in the Rhetorick of thoſe times, ſeeming to intimate to his people, that though no humane Law had interpoſed it ſelfe, yet the divine equitie of this cauſe might be eminently enforced out of ſacred Writ.

King *Edmund* in a Synod holden at *London* at which was preſent Oda ȝ pulſtan ſſncebiceop ȝ mænize oþþe Birceopaſ, *Oda* and *Wulfſtan* Archbiſhops and many other Biſhops; made this law for holy Church: ȝeoþunȝum ſe bebeboaþ ælcum cniſtenum men be hiſ cniſtenbome ȝ ȝynicſceat ȝ ælmeſſeoh: Gif hit hpa ðon nylle ſy he amanſumoð: that is, We command all Chriſtian men by their Chriſtianitie to pay Tythes, Church ſcat, and Almesfee, if any refuſe to do it let him be accurſed.

Concerning the ælmeſſeoh mentioned in the Law, it was that Almes-money which was called the peterpence, for when *Ina* the Weſt Saxon King went in pilgrimage to *Rome*, he made it a Law to his Subjects, that every houſe ſhould pay a penie to the Pope, and this was to be tendred at Saint *Peters* tide, as appeareth by *Edgars* Law num. 4. And ſy ælc heonþ peninȝ aȝyfen be Petneſ meſſe dæȝ, &c. See alſo the Laws of *Cnute* and *Edward* the Confeſſour.

And whereas we finde the curſe of Excommunication here annexed by the Law to this Sacriledge of with-holding the Tenth, it is

not

not without a parallel: ſos amongſt thoſe ſolemne execrations which by a councell held here at *Oxford*, were to be openly pronounced four ſeverall times in every yeare, we find theſe Church-robbers twice branded with *Anathema*. In the firſt Article thus: All they been accurſed the rightys of holy Chyrch as in the Londys tents rent, poſſeſſions, maryces, leſours, paſtors, ways, Paths wetingly, & unyuſtly, or malycioufly defoulen and with-holden councelen huyden or to with-hold or to avoyde procuren. In the 26. Article in this manner Alſo all they ben accurſed more and leſſe whiche wytingly, wylfully, or malycioufly, and unwyſly, for ony man hath had utterly the Servants of God, that is to ſay, their Perſones, Vicars, Chapelyns, Parochialys whatſoever condycyon they been or ſame the tyths, proventys, profyts, oblations of cuſtome and conſuetude uſed laſſe or more with-holden or done to be with holden, or the ſayd tyths or oblatyons changen or turnen into other uſe than it was provided in the holy Chyrch law. But of this ſee more *Cap* 3. *Sect.* 2.

In the Laws of King *Edgar*, it was decreed in the firſt place, ƿ godeſ cyricean ſyn rihteſ ripe ⁊ man agyfe ylce æle reoþunge to ꝺem ealdem minſtre þe ſeo hyneſſe tohyrþ That Gods Church ſhould have all her rights, & that every man ſhould pay his Tythes to the Elder Minſter (or Mother-Church) where he heareth the Word *cap.* 2. of *Edgars* Laws: *See* alſo the 3. & 4 *Chap.*

In the Laws of King *Cnute cap.* 8 thus it is, ⁊ gelæſte man godeſ genihtraæghpilce geare rihtlice geonne þæt it fulhælmeſſe riftene niht oſer eaſtran ⁊ gegode teoþunge be Pentecoſten ⁊ eorþ fæſtma be ealra halgena mæſſan ⁊ ginþra ꝺonne þa teoþunge gelæſtan nælle ſpa he gecpeꝺan habbaþ ƿ it ſe teoþa æcer eal ſpa ſe fulh hit gegaþ þonne ſcape to þæſ cyninges geneſe ⁊ þaſ birco. þaſ ⁊ þæſ lanꝺ rican ⁊ þæſ myntſtes mæſſe pneort ⁊ man unþancer þonne teoþan ꝺæl þam myntſtep de hit

to

to gebiriȝe ȝ ræcan him to þam niȝoþum dæle, ; ȝ to ǽrie man þa eahta dælaȝ on tpa ȝ þo ȝelandhlaforþ to healfum ȝ to healfam ȝe biȝcop.ȝý hit cyninȝeȝ manȝý hit þegneȝ: That a man muſt be carefull rightly to pay Gods rights every yeare, to wit the Plough-almes 15. nights after *Eaſter*, and the Tyth of the young Cattle by *Witſontide*, and the fruits of the Earth by *Alhalgentide*. And if there be any that will not pay his Tenth, ſo as we have ſaid, that is the tenth Acre according to the going of his plough, then the Kings Reve and the Biſhops, and his that ows the Land, together with the Maſſe-prieſt of the Minſter may go and take away the tenth part whether he will or no, and give it to the Minſter whereunto it belongeth; The ninth part he may take to himſelfe; as for the eighth parts let them be divided in two, and let halfe go to the Land-Lord, and halfe to the Biſhop, whether it be one of the Kings men, or a Thane.

Concerning the Plow-almes, for which the *Saxon* ſaith ȝulhælmeȝȝ *Lombard* ſaith thus: *Ego me legiſſe memini in vetuſtiſſimo quodam legum Ethelred Regis libello impoſitum tunc temporis in ſingula aratra denarium unum &c.*

when he returned home, pay Tythes to God of all that God ſhould give him: the like did King *Edgar*, and King *Edmund*, commanding that thoſe which wilfully refuſed to pay their Tythes, ſhould be excommunicated.

Hovenden. part. 2. c. De Decimis Eccleſiæ.

William the *Conquerour* (as *Roger Hovenden* reporteth) in the 4. yeare after his conqueſt, having ſome time of reſt from war, and ſetling of rebellious ſpirits, who kicked at his goverment at home, entred into a conſideration of the well ordering of the Church and Common-wealth, by wholſome Lawes: and therefore by the adviſe of his Counſell he ſummoned all the great Prælates and Potentates of this land, with twelve other ſufficient men

of

of every Shire, experienced in the Lawes and cuſtomes of the Land, that he might by them learne, by what Lawes and cuſtomes the Land was governed, before himſelfe came to the Crown thereof, ſtraitly charging and commanding them upon his high diſpleaſure, they ſhould make true report to him thereof, without adding any thing thereunto, or taking any there from: who being with the Lawes of holy Church, becauſe by it, the King and his throne are eſtabliſhed, among other Laws and liberties of the Church, recorded this for one, which I will *verbatim* ſet down in Latin as it is penned by the Author.

De omni Annona decima garba eſt Deo reddita, & ideo reddenda: Si quis gregem Equarum habuerit, pullum reddat decimum: qui unam tantum vel duas habuerit, de ſingulis pullis ſingulos denarios præbeat. Similiter, qui plures Vaccas habuerit, decimum vitulum, qui unam vel duas, de ſingulis vitulis ſingulos denarios, & qui caſeum fecerit, det decimum Deo, & ſi non fecerit, lac decimâ die. Similiter Agnum decimum, Vellus decimum, Butyrum decimum, Porcellum decimum. De Apibus vero ſimiliter, decimum commodi: quinetiam de boſco, de prato, de aquis, de molendinis, parcis vivariis, piſcariis, virgultis, & hortis, & negotiationibus, & omnibus rebus quas dederit Dominus, decima pars ei reddenda eſt, qui novem partes ſimul cum decima largitur. Et qui eam detinuerit, per juſtitiam Epiſcopi, & Regis (ſi neceſſe fuerit) ad ſolutionem arguatur. Hæc enim S. Auguſtinus prædicavit & docuit, &

See for this the lawes of *Edward* the Confeſſour, num. 8. & 9. by whom this decree was firſt made, and afterwards ratified by the Conqueroure.

& hæc concessa sunt à Rege, Baronibus, & populo. Sed postea instinctu Diaboli multi eam detinuerunt, & Sacerdotes negligentes non curabant inire laborem ad perquirendas eas, eo quod sufficienter habebant vitæ suæ necessaria. Multis enim locis modo sunt tres vel quatuor Ecclesiæ, ubi tunc temporis una tantum fuit, & sic caperunt minui.

This *Augustine*, to whom the *Conqueror* here referreth himself, was *Augustine* the Monke, whom *Gregorie* the great about the yeare of our Lord God 569. sent here into *England*, to reestablish the Faith decayd by the *Saxons*, who set down sundry ordinances for the Church, and framed it in uniformity of Prayer and government to that, which then was used in the Church of *Rome*: but long before *Aug.* time, as it may by our stories appear, (even in the dayes of King *Lucius*, who sent to *Eluetherius* a Bishop of *Rome*, for learned men to instruct him and his people in the Faith, which was about a hundred & forty years after the Ascention of our Lord Jesus Christ) the Faith of Christ was here preached in *Britaine*, and fifteen Archbishops are by our stories reported, one to have succeeded an other in the See of *London*, before the irruption of the *Saxons* into this Land: All which time it is not like the Churches of God that were in the Land, were void of this provision for the Ministerie, so that I assure my selfe the payment of Tythes was fare more ancient then the time of *Augustine*; albeit the *Conqueror* citeth there the authoritie of *Austin*, rather then any former precedent of the

Ethelward lib. unico.

Jocelin of Furnes in his Book of British Bishops.

Marianus Scotus.

Britons

Britons, both for that the doctrine of *Auſtine* was better known unto the *Saxons*, among whoſe Anceſtors *Auſtin* taught and governed as an Archbiſhop, than any of the Fathers of the *Britiſh* Church to whom the *Saxons* were enemies, and their tongue altogether unknown unto them; and beſide for that this doctrine of *Auſtine*, concerning Tythes beſt ſuited with the generall cuſtome that was then uſed throughout all Europe in paying thereof.

The next Prince after *William* the *Conqueror* that ordered any thing about payment of Tythes, for ought that I have read to the contrary was *Ed.* 1. who at the petition of the Clergie, eſtabliſhed the Articles of the Clergie, which his Sonne *Edw.* 2. confirmed by his Letters Patents under the great Seal, and by conſent of Parliament, at the petition of the Clergie in the 11. year of his Reign.

In *Edward* the thirds time, Writs of *Scire facias* were granted out of the Chancerie, to warne Prelates and other Clerks, to anſwer for the Diſmes there, but after the matter was well underſtood by the King, the parties were diſmiſſed from the Secular Judges, for ſuch manner of pleas, ſaving to the King his right, and ſuch as his Anceſtors had, and were wont to have of Reaſon. *An.* 18. *Ed.* 3. *c.* 14.

During the Reign of *Richard* the ſecond, Parſons of holy Church were drawn into ſecular Courts for their own Tythes, by the name of goods taken away; And it was decreed by the King, that in ſuch caſe the generall averment of the plaintif ſhould not be taken, without ſhewing ſpecially how the ſame was his Lay-cattell. *An.* 1. *Rich* 2. *cap.* 14.

By

By the Statute of the first of the same King cap. 14. it is acknowledged, that the pursuing for Tythes of right doth, and of old times was wont to pertaine to the Spirituall Court, and that the Judges of holy Chruch only have the cognizance of these matters.

By the Statute of *Ed.* 3. it is ordered, that Ministers of holy Church, neither for money taken
15. *Ed.* 3. for the redemption of corporall penance, nor for proof and account of Testaments, nor for travell taken about the same, nor for solemnity of Mariage, nor for any other thing touching the Jurisdiction of holy Church should be appeached, or arrested,
2. *H.* 4. or driven to answer the Kings Justices, or other ministers, and thereupon they should have writs in the Chancerie, to the Justices when they demand them.

In the second year of *Henry* the fourth, the Religious of the order of the *Cystercians*, that had
5. *H* 4. c. 11. purchased Buls from the Pope to be discharged of the payment of Tythes, were by act of Parliament reduced to the state they were in before.

In the 5. year of the same King it was ordered, That all Farmers and Occupiers of any lands or possessions belonging to any Fryers Aliens, should pay all manner of Tythes due to Parsons and Vicars of holy Church, in whose Parishes the same were, as the Law of holy Church required notwithstanding the same were seised into the Kings hand or any Prohibition were made, or to be made to the contrary.

About the 7. year of the same King, such religi-

ous

ous perſons as had purchaſed Buls from the Pope in the days of *Richard* the ſecond, to be diſcharged Diſmes pertaining to Pariſh Churches, Prebends, Hoſpitals, or Vicarages, not put in execution, were forbid from that time forward, to put them in execution, or to purchaſe any other in time to come.

After King *Henry* the eigth had diſſolved the Monaſtaries, and other like religious houſes, and ſold the Churches and Tyths thereto belonging to Lay men, (who before that time were not capable of the ſame; inſomuch as after the diſſolution, when the Purchaſers demanded the ſame, they were denied to hold plea thereof, by reaſon of their incapacitie) a Statute was made in the 25. yeare of the ſame King, whereby all ſubjects of the Kings Dominions were to pay their Tythes, and their duties of holy Church, acrording to the Eccleſiaſticall Lawes and ordinances of the Church of *England*, and after the laudable uſes and cuſtomes of the Pariſhes and places where they dwelt, or occupied lands, and the ſame to be ſued for before the Ordinarie, or ſome other competent Judge of the place, according to the courſe and proceſſe of the Kings Eccleſiaſticall Courts of *England*: which Statute becauſe it took little effect, by reaſon of the obſtinacie of the people in not yeilding theſe duties to the Laitie, who had purchaſed them, and that the ſaid Purchaſers could neither by the order or courſe of Eccleſiaſticall Laws, ſue for them in any Eccleſiaſticall Court of this Land, whereby they might be relieved againſt them that wrongfully detained the ſame; Therefore in the 32. following, another

27. *Hen.* 8. *cap.* 20.

32. Hen. 8. cap. 7. other Statute was made, wherein it was enacted, that all and ſingular perſons of this Realme, and other of the Kings Dominions, of what ſtate, degree, or condition ſoever they were ſhould fully, truly, and effectually divide, ſet out, yeild and pay all and ſingular their Tithes and Offerings to the owners, proprietaries and poſſeſſors of Parſonages, Vicarages, and other Eccleſiaſticall places according to the lawfull cuſtomes and uſages of the Pariſh and places, where ſuch Tythes or other duties riſe and grow due. And in caſe where any are wrongd and grieved, being either an Eccleſiaſticall or Lay perſon, for the wrongfull deteining or with-holding of the ſaid Tythes or Offerings, or any part or parcell thereof, the ſame to have full power and authority to convent the ſame perſon or perſons ſo deteining the ſame, before the Ordinarie or other competent Judge to have power, by vertue of the ſaid Act, to hear, decide and determine the ſame by definitive ſentence, according to the courſe and proceeding of the Eccleſiaſticall Law, without reſervation of any right to the Temporall Judge to give remedie by any ſuit or action for the recouery of the ſame; ſaving in caſe where an inheritance or freehold in the premiſes is claimed, and the perſon claiming is diſſeiſed, deforced, and put from the poſſeſſion of the ſame, in which caſes onely, the State alloweth the Temporall Judge to take knowledge, and that onely for the regaining of the right and poſſeſſion of the inheritance ſo loſt.

After the decreaſe of King *Henry*, King *Edward* his

his Son tending in like ſort the ſtate of the Clergie, the benefit of his ſubjects, and the practize of the Eccleſiaſtical Courts of this Land, made a Statute whereby he did not onely ratifie, confirm and allow ſuch Statutes as his Father had formerly made, but did further order, that every of the Kings ſubjects from thenceforth ſhoulr juſtly and truly without fraud or deceit, ſet out and pay all manner of predial tythes in their proper kind, as they did riſe and happen, in ſuch manner as had been paid within the forty years next before the making of the Act, or of right and cuſtome ought to have been paid, with certain forfeitures and penalties, as well againſt them which carryed away any predial Tythes, before the tenth part thereof were juſtly divided from the ſame, or otherwiſe agreed for, with the owner thereof; as alſo againſt thoſe that did let or hinder the owner thereof, his deputie or ſervant, to view, take or carrie away the ſame. Enacting further, that the partie ſo ſubſtracting or withdrawing any of the Tythes, obventions, profits, commodities, or other duties aforeſaid, might or ſhould be convented or ſued in the Kings Eccleſiaſtical Court, by the party complainant, to the intent the Kings Eccleſiaſtical Judge might determine the ſame according to the Kings Eccleſiaſtical Laws. And that it ſhould not be lawfull for the Vicar, or any owner or farmer thereof, contrary to the ſame Act, to convent or ſue any withholder of Tythes, or any other like duties, before any other Judge then Eccleſiaſtical, exceping onely out of the ſaid Statute things contrary or re-

pugnant to, or against the effect and meaning of the Statute of *Westminster* the second, the fifth Chapter, the Statutes of *Articuli Cleri*, *Circumspecte agatis*, *Sylva Cedua*, the treaties *De Regia Prohibitione*, matters against the Statute of *Anno Primo Edwardi primi Capite decimo*, and such other matters beside, wherein the Kings Court of right ought to have Jurisdiction.

CAP. II. SECT. II.

That the Statutes of the xxvii. *and* xxxii *of Henry the eight, and the second of Edward the sixth. Cap.* 13. *intended for the true payment of Tythe, and the preservation of the trial thereof unto the Ecclesiastical Courts, are now turned to the hinderance of them both.*

NOtwithstanding all which good provision of Ancient Kings before the Conquest, and modern Kings since the Conquest, for the assuring of the suit of Tythes to the Ecclesiastical Courts only, and the continual possession that the Ecclesiastical Courts have had of the same, deduced fro so ancient time, as hath bin before shewed, & so often obtained in contradictorie judgment, as the consultations thereupon granted do testifie: yet sundry men of this Land, in sundry ages, have by wrenches and subtile devises (which are odious in Law, and are by all godly and wise Judges by all possible meanes evermore to be restrained) raised up matter out of the said statutes themselves, contrary to the true sense

ſenſe and meaning thereof, to draw the tryal of moſt of thoſe matters away from the Eccleſiaſtical Courts. So that thoſe Statutes which then were intended for the good of the Eccleſiaſtical Courts, are now become the utter ruine and overthrow of the ſame, contrary to the rule of the Law, and common reaſon, that things which were purpoſed for one end ſhould work unto another.

L. legata inutiliter ff de adimendis legatis. l. 2. ante finem. C. de jurejur. propter calumniam dando.

The firſt advantage they take againſt the Eccleſiaſtical Courts out of theſe Statutes, is gathered out of the twenty ſeventh, and thirty ſecond of *Henry* eight where it is ordered, that all the Kings Subjects ſhall pay their Tythes, according to the laudable uſes and cuſtomes of their Pariſhes, and places where ſuch Tythes grow and become due: which, albeit is undoubtedly meant of Eccleſiaſtical cuſtomes, triable at the Eccleſiaſtical Law, and ſo ever held till now of late, that men think all too much that goeth beſide their own net; yet there want not in theſe daies, which go about with all might and main to draw away theſe things unto the Temporal Courts, as belonging to the Temporal Crown and dignitie: wherein they do wrong, not only to the Kings Eccleſiaſtical Courts, to ſpoyle them of their ancient Juriſdiction, but alſo do injurie to the King himſelf, as though he had but one proper Juriſdiction belonging to his Throne, and ſeat of Majeſtie, and that which were done by his Eccleſiaſtical power, were done againſt his Crown and dignitie; whereas they are equally united in him, and his Throne is no leſs ſtayed up by his Eccleſiaſtical power, then it is upholden by

27. & 32. H. 8.

his Temporal authority. And therefore a mere paradox is that, that they ſo conſtantly affirm that cuſtomes in payment of Tythes are matter of Temporal Cognizance only, and not of Spiritual cognition. For as there be ſecular cuſtomes ſuch as are the cuſtomes of Mannors and Lordſhips, where the Lord hath his Rent, his heriot, his reliefe and ſervice; and the tenant again doth his homage and fealtie, according to the nature of his Tenure, which ſecular cuſtomes the forenamed Statute *De Regia prohibitione*, forbiddeth Eccleſiaſtical Judges to deal in: So alſo there are Eccleſiaſtical cuſtomes, ſuch as is the payment of Tythes, and other Eccleſiaſtical duties, to which Common Lawyers are not to put their hands, but to abſtain from them, as dedicated to the uſe and trial of the ſpiritual Courts. Otherwiſe would neither be ancient Authors of the Legatines, and Provincial Conſtitutions of this Land (the eldeſt of which, are equal with the dates of *Henry* the third, and the youngeſt of them endeth in the reigne of *Henry* the fifth) ever have changed ſo many ſeveral cuſtomes of payment of Tythes, as then were within the Land, and inſtead of them, have brought in one uniform payment of the ſame, as it is at this day uſed, ſave where either the negligence of the Parſons, or the covetouſneſs of the Pariſhioners hath in ſome point changed the ſame. Neither would theſe ſtatutes of *Henry* the 8 ever have ordered the people ſhould pay their Tythes after the laudable cuſtoms and uſages of the Pariſhes where they grew, if the uſage

Provicial. c. quoniam de decimis.

uſage and cuſtome of the payment it ſelf had not been ſubject to the Eccleſiaſtical Cogniſance: for in vain ſhall a man ſue for that, the Law allows him no courſe to come by, if it be denyed in the ſpecialleſt point belonging to the ſuite: for this is undoubted Law: wherever there is an authority or Juriſdiction granted, there are in like manner granted all thoſe things, without which that authority, or Juriſdiction cannot be perfected, or performed.

L. Pinali. ff. de officio ejus cui mandata eſt juriſd. & l. 3. ff. de pœn. legata.

CAP. II. SECT. III.

That cuſtomes of payment of Tythes are tryable onely at the Eccleſiaſtical Courts.

AND therefore it is without queſtion, as Tythes by the ſaid Statutes, are onely recoverable by the Eccleſiaſtical Law, and not elſewhere; ſo alſo the cuſtome whereby they are paid, is only triable at the Eccleſiaſtical Law. Otherwiſe this inconvenience will follow thereupon, which in other Laws, beſide this of ours is a great abſurditie, that the connexitie of the cauſe, which the Civilians call *Continentiam cauſarum*, will be diſmembred and diſjoined, which by all good policie, together with all her parts emergent or annexed, ought to be handled, diſcuſſed, and determined before one and the ſelf ſame Judge; one, I mean not in number, but one in profeſſion, for otherwiſe I ſhould by this aſſertion bar appeales, which is not mine intent.

Bartol. l. nulli C. de judiciis. Glos. c. ſignificaverunt de judiciis.

Which courſe if it were held here in *England*, cauſes ſhould not be drawn piece-meale in ſuch ſort as *Medea* tore her brother limb meale, and one

Cicero pro Murena.

part of them carried to this Court, another to that like unto the rent limbs of the Child that were cast here and there by *Medea*, thereby to hinder her Father from pursuing her; but all should be ended in one and the selfe same Court, which would be a great ease to the Subject, who now to his intolerable vexation, and excessive charges is compelled to run from Court to Court, and to gather up as it were, one limb of his cause here, and another there, and yet happily in the end cannot make a whole and perfect body of it.

Beside, it is a mighty disorder in a commonwealth, thus to jumble one jurisdiction with another, and the very confusion as well of the one Law as the other; for as Kingdomes are preserved by knowing their bounds, and keeping their limits, so also Jurisdictions are maintained and upheld by containing themselves within the lists or banks of their authority.

Further, unless they will grant that there is an Ecclesiastical custome, as there is a Secular Custome, and that the one is as well to be tried in the one Court, as the other is in the other, they will make their own Doctrine in the before-rehearsed Prohibition voyd, where they will have it certain, that there is a Secular custome; and if there be a Secular Custome, then doubtless there is also an Ecclesiastical or Spiritual custome; for the word Secular, is not put in that place absolutely, but relatively; and the nature of Relatives, is one to put another, and one to remove another: but in the Secular customes they barr the Civilian, therefore they

Glos in Clem. unica in verbo æternaliter de summa trinit. & fide Catholica.

they grant him the spiritual, for of contrary things there are contrary reasons, and contrary effects: and what that which is proposed, doth work in that which is propounded, the same again which is opposed, doth work in that which is opponed, by which Rule as Temporal Lawyers are to deal in Temporal Customs, and spiritual men are not to intermeddle therein, so also Ecclesiastical Lawyers are to deal in Ecclesiastical causes, and temporal Lawyers are not to busie themselves there about. *L. Fin. §. plus autem de legatis 3. & ibi Angel.*

And that this was the intent of the King, when he first received the Church into his protection, with all the priviledges thereof, may appear hereby, that having united both the Jurisdictions in his own person, he did not jumble them both together, as now they are, but kept them distinct, one from the other; not onely in authorising the Ecclesiastical Courts that were before, but also in using the very words and phrases that the Jurisdictionaries Ecclesiastical did use every where in their writings, even these words whereupon men now take hold to frame Prohibitions. *viz.* (according to the laudable customs and usages of the parishes and places where such Tythes grow) which were the words of *Innocent* the third in the Decretals upon the title of Tythe, long before these Statutes were made, or any other Statutes concerning the true payment of Tythes; and *Lindwood* in the same title of Tythes often useth the very self same words and phrases that the other doth: so that if these words made no Prohibition before the Statute (as I think it cannot well be

shewed to the contrary) neither ought they to do it now since the Statute; for that they are spoken still in the Church business, and not in a temporal matter: whose government, although it be under one and the same Prince, that the temporal state is, yet is it distinct from the same, as ever it hath been since there hath been any setled
1 Cor. 5. form of Church-government in any commonwealth, as may appear both by the example of Saint *Paul* which never goeth to any temporal power to punish the incestuous person, although there were sundry lawes then both in Greek and Latin written of these matters, but doth it by the spiritual sword alone: and also by that, that in matters of jarre for worldly causes between brother and brother, he forbids such as were new
1 Cor. 6. Christians to go to Law before infidels, but adviseth them rather to appoint Judges among themselves to decide such controversies: which albeit in those daies was meant as well of Lay-christians, as of the Ministers of the Gospel, for that the number of them was small, and the causes of suit they had one against another were not many, any might easily be ended by one and the self same consistorie; yet when the number of the Christians increased, and the Church got some rest from persecution, the Jurisdiction was again divided; and as there were secular Courts appoined by Princes, wherein temporal mens causes and lay-businesses were heard, so there were also by the same authority erected Ecclesiastical Courts and Bishops audiences, wherein either Ecclesiastical mens causes alone,

or

or such as they had against Lay-men, or Lay-men against them were treated of, and determined. *C. de Episcopali audientia tertia.*

So that this was no new devise of *Henry* the eight, or *Edward* his Son, that when they took upon them the supremacie over the Church, as they had before over the common-wealth, they did not mishmash both the States together, and made one confused heape of them both, but left them severed as they found them, onely affording either of them an equal proportion of protection; for that by these two parts, the Kings Monarchie is compleat, and himself is the head and cheife Governour of the whole and entire body of his Realm. For this was exemplaried unto them in all former ages, since the Church and common wealth had any loving and kind cohabitation together as hath been before remembred. And therefore they do wrong to the ashes of those Kings deceased, which by subtil sense and strained interpretations, draw these Laws which they intended for the benefit of the Church, and Church-government, to the overthrow of the same, as though the Positive Laws of the Kingdome, could not stand, if the Laws of the Church continued and stood upright.

CAP.

CAP. II. SECT. IV.

That the limits and bounds of Parishes are of the Ecclesiastical Cognisance onely.

Upon the same words of the same Statute, (if perhaps at any time there grow any controversie about the limits or bounds of Parishes) they draw the same by like importunity from the trial of the Ecclesiastical Law; unto the common Law, avouching the same also to be of the Temporal cognisance; and yet *Lindwood*, who lived in the daies of *Henry* the fifth, making a Catalogue of the principal matters that in his daies belonged unto the Ecclesiastical Courts, reckoneth the bounds of Parishes for one, And very like it is that it should so be, for that Ecclesiastical men first in this Kingdome made divisions of Parishes, as by our own Chronicles it appeareth; and the first practice thereof within this Realm, came from *Honorius* the fourth Arch-bishop of *Canterbury* after *Augustine*, who himself died in the year of our Lord God 693. * although otherwise the thing it self be more ancient, and descends from the councel of S. *Paul*

Registro Eccl. Xpi. Cant. Stow.

*He that shall trace the Writers for that which concerns the original of Parishes, may find some probable issue, if the course of Antiquity run cleer. Those that first gave example to others in this matter, are conceived to be the ancient Roman Bishops; for it was recorded in the *Pontifical* of *Damasus* (as some would have it) But in *Anastasius Bibliothecar.* we find it, that when *Peter* had appointed and ordained Priests, *&c.* and *Cletus* had reduced them to a certain number, Pope *Evarist* assigned to each which

which he gave to *Titus c.v.* 5. to appoint Elders in every City: But that Cities and Countries again are divided into ſeveral Pariſhes, it was the ordinance of Pope *Dionyſius* about the year 266. and from

of them his Pariſh, or as they then ſaid, his Title: For ſo a Title is

underſtood by *Cnuphrius*, and ſo in effect it may be taken; though otherwiſe *Paræcia* is *Accolatus ad ſacrum Ædem*, *Titulus autem Ædes ipſa*. And it may ſeem, that *Titulus* might be taken for *Paræcia*, becauſe this hath been taken for that: For in the Councels we ſhall ſometimes find a Pariſh put for a Pariſh Church, which is the meaning of *Titulus*, ſee *Baronius ad an. Ch.* 112. where the learned Cardinal ſetteth down at large what theſe Titles were, and why they were ſo called. As for the time when theſe Pariſhes were aſſigned by *Evariſt*, it muſt be about the beginning of the ſecond Centurie.

This done, and the number of new Converts increaſing, *Hyginius* placed ſeveral Prieſts in ſingular Pariſhes, and the chief of thoſe he called *Cardinales Presbyteros*: and here we muſt believe, that the Romiſh Cardinals began, if at leaſt we will be guided by their Hiſtorians. In after-times Pope *Denis* improved theſe conveniences invented by his Anceſtours, and ſet limits to Pariſhes. And this was done about the year 260. If theſe things be anſwerable, as they are generally received by the Romiſh Antiquaries, then it may ſeem that other Nations made the like proviſion ſooner or later, according to their example. And this is the rather to be believed, becauſe this Pope *Dionyſe* wrote an Epiſtle to *Severus*, Biſhop of *Corduba*, to obſerve this order in his Diocele, and look what courſe himſelf took, that he ſhould direct other Biſhops to do in like manner. What was elſewhere done doth not ſo neerly concern, but here at home the firſt diviſion of Pariſhes is aſcribed to *Honorius* Arch-biſhop of *Canterbury*, as the Author here hath cited out of the Regiſter, and it is approved by *Cambden*. *Sed videndum, &c.* ſaith *Marſil* in his Book *de reb. Eccl Chap.* 12. But heed muſt be taken to the Equivocation of the word Pariſh, for it hath not always had one and the ſame acception. Sometime when nothing is named but a Pariſh, the whole Diocele is underſtood, and this notion of the word often occurs in the Councels and elſewhere. According to this ſenſe *Barbatia* ſpake a wide word for the Pope, where he ſaith that in reſpect of him, the whole world was but one Pariſh, *tract. de*

him

him derived into this and other Realms; and the distinction thereof was chiefly devised that it might be known of what congregation every people were, and that so they might be trained up in the School

Question, Cardinal. Otherwise a Parish is taken for such a part of the

Diocese, which is assigned to some Priest, arbitrarily sent and maintained by the Bishop; for it is to be noted that such a Parish paid all dues to him, and he to his Clergy: for the primitive communitie of living, because of inconvenience arising in the Church, this custome was introduced, that all Churches dues should be at the Bishops disposing, so that being geometrically divided into four portions, he should have one part, and his Clergy another, the third to be distributed to the poor and Strangers, and the last part to be reserved to the Parishioners for the repairing of Churches. And that this was the use especially of the Romish Church, plainly appeareth by the answer of Gregorie to our *Austin*, in *Bede lib. 1. cap. 27.* The collection of these dues was committed to the care of the *Chorepiscopus*, as appeareth by an Arabick Canon of the first Councel of *Nice*, which together with other Oecumenical Councels, and those Canons which are called the Apostles, and some History of the primitive times, out of *Clement*, &c. we enjoy and esteem as a most peculiar monument transported hither out of the Eastern world, and placed in our publick Libraries by the bounty of a worthy Benefactor Sir *Thomas Roe*. The latter end of that Canon saith thus,

وينظر ايضا الى ما في سلطانه من القرى والرساتيق
فيفرض على كل قرية ورستاق شيأ له بقدر احتمالها
لنفقته اعني السقف فيجبيه له في كل سنة ويدبر
لكون بسريتم مونة الاسقف وعليه ايضا صدقات والغاريبان
وما يعرى به الكهنة ليجري دينه وبينهم الالفة

where the Canon provideth, that it should belong to the Charge of the *Chorepiscopi* to see that in every of their several Cities and Country Villages, these dues should be collected proportionably as every place should be found able; and that these dues so collected, should be every year brought to the Bishops place of abode, that there they might be disposed of toward the maintenance of the Bishop, the reliefe of the poor and Strangers, and the encouragement of his Clergy, that so there might be concord and unanimity between him and them, &c. The Latine Translation of these Canons is set forth by *Turrian* and *Alphonsus Pisanus*, of

of Godlineſs under their own Paſtor or Miniſter. But that now the diviſion of Pariſhes doth ſerve to other politick uſes, it comes not of the firſt inſtitution thereof, which was meer Eccleſiaſtical: but it

and is to be found in the 1. Tome of the Councels ſet forth by *Binius*. In the Tranſlation, this Canon is the 54. but he that minderh to ſee it in the Arabick muſt look for the 58. Some ſay, that theſe Canons are ſuppoſititious; I onely know that they may be ſo, not that they are: and however it may be dull to entertain any thing that ſhall be obtruded, yet the rejection of ancient Authors and Councels ſhould be warily concluded upon. Thus much not withſtanding is recorded, that by reaſon of the Arrian incendiaries, a compleat number of the Canons of this Councel was ſo rarely found, that *Athanaſius* himſelf, who was preſent at the Synod, was forced to ſend into theſe parts to the Biſhop of Rome, that then was, to deſire from him a perfect Copie, becauſe in the Eaſtern world, few or none had eſcaped the fire of the Arrians. This we have out of thoſe Epiſtles, which are ſuppoſed to have paſt between Pope *Marke* and *Athanaſius* concerning the burning of the decrees of this firſt *Nicene* Councel; and if theſe be true, the Canons here are the leſs to be ſuſpected: But againſt the credit of thoſe Epiſtles, the Cardinals *Bellarmine* and *Baronius* have conſented, and it may well be thought they have ſome cauſe, for that theſe Canons much availe their faction, and depend not a little upon the Authority of theſe Epiſtles; yet their reaſons againſt theſe Epiſtles are, for the moſt part Chronological; and becauſe ſuch as theſe are Subject to much hazzard, therefore our confidence in believing may be arbitrarie, and at our own diſpoſing. But be theſe Canons how they will, yet a moſt expreſs monument of this *Quadripartite* diviſion of Church dues, may be noted out of an Arabick Canon of the Goſpel of *Antioch*, *Canon* 25. I ſay, an Arabick, not for curioſitie, but becauſe I find this matter more fully there ſet down, for the Greek ſaith thus, Ἐπίσκοπον ἔχειν ἐξ ἀρχῆς τὴν ἐκκλησίας προσόδων ἐξουσίαν ὥστε διοικεῖν εἰς πάντας τοὺς δεομένους μετὰ πάσης εὐλαβείας καὶ φόβου θεοῦ. That the Biſhop ſhall have the Church dues in his power, that he may diſpoſe of them to every one that needeth religiouſly & in the fear of God. But the Arabick Canon more diſtinctly,

الاسقف مسلط علي متاع الكنيسة ومالها ان يقسمه
ويودعه بيدين كهنته وعلي اهل ابرشيته وعلي الفقرا
والمساكين ويأخذ هو من ذلك قوته وما يحتاج اليه

That the Bishop shall have at his

groweth out of a second cause that is, because being so fitly and aptly primarily divided by Ecclesiastical men as they are; the Princes therefore did use the opportunity thereof for temporal services, disposing the Church dues and revenues, to the end, that he may divide and distribute them to his Clergy, to the Parishiones (for the repairing of Churches) to the poor and needie, and that he may take to himself what shall be necessary for his own expense, *&c.* This *Quadripartite* Division was used in most places, but most principally in the Roman Church. For in some other the Bishop had the third part. See *Filesacus* in his Book *De Sacra Episcoporum Authoritate.*

Concerning the Original of a Parish in these two former Acceptions, it may be acknowledged to be a device of the ancient Roman Bishops, and to have been derived from them to other Nation. But a Parish may be also taken for such a part of the Diocesse, which is limited to some residentiarie incumbent, allowed by the Bishop, and maintained by the Church dues in his own right. And this consideration of a Parish most of all agreeeth with those which we now have. And it may very well be supposed, that these later Parishes have had their beginning from the inconveniences of the former. And the designment and limitation of these however it might have special encouragement from the devotion of lay-men, yet the principal stroke, was alwaies given by the Ecclesiastical, to whom it pertained to consecrate the Churches, and make them baptisterial. And that the dividing of Parishes should of right belong unto Ecclesiastical men, it may be the most reasonable, because the first that ever divided any Parishes were the Roman Bishops, and they did not onely so, but also gave direction to other Prelates in their several Provinces to do the like, especially if that be true, which we have formerly cited out of that Epistle of Pope *Denis* to the Spanish Bishops. However *Alexander* the third *c. Avaritia. De Prabend. & Dig.* gave command to the Canons Regular of *Yorke* Diocesse that they should not presume to divide Parishes *sine consensu Archiepiscopi.* And some encouragement may be had from a decree made in a Synod holden at *Westminster*, about the year 1147.

sub-

ſubdividing the ſame again into many Tythings or like ſmaller diviſions, for the more ſpeedy ſervice of the King, and better ordering of the common wealth, Which our ancient Fathers well knowing, never called the ſame in queſtion, acknowledging therein the good they had received from Eccleſiaſtical men, by this partition of Countries into Pariſhes: but men of later age being leſs thankful then they, and loath to ſeem beholding to Eccleſiaſtical Courts for any matter of good order and diſ-

which ſaith, c. 4. *Nullus Abbas, nullus Prior, nullus omnino Monachus aut Clericus Eccleſiam, ſive decimam, ſeu qualibet beneficia Eccleſiaſtica, de dono laici accipiet ſive proprii Epiſcopi authoritate, & conſenſu: quod ſi præſumptum fuerit, irrita erit donatio hujuſcemodi. Chron. an 8. Biblioth. Bodleian.* And the like intimation is given in another Councel, holden at the ſame place, in the year 1149. called by the moſt reverend Father in God *William*, then Lord Arch-biſhop of *Canterbury*. There it is ſaid, *cap.* 10. *ut nulla perſona Eccleſiaſtica vel decimas ſeu qualibet alia Eccleſiaſtica beneficia det vel accipiat ſine conſenſu & authoritate Epiſcopi.* If we apply theſe decrees to the matter in hand we may deduce ſomthing anſwerable to that which is inquired, beſides Lay-men were not to meddle with the ordering of Tyth payment, and yet in this diviſion of Pariſhes, a principal reſpect was had to the conſideration of Tythes, and therefore it was, that pariſhes were limited with ſuch great care and curioſitie. For *Bartol* ſaid, That if it were doubted concerning a houſe, in what Pariſh it ſhould ſtand, it muſt be conceived to be of that into which it opens, if it be opened ſeveral waies, a poſtern gate was not reſpected, but it was judged to belong unto that Pariſh into which it opened at the chief Gate

At what time this laſt kind of Pariſhes began elſewere, we enquire not, when they began here at home, we find not unleſs we underſtand ſuch as theſe in the Diviſion of *Honorius*: however they muſt be in uſe before the daies of *Edgar*, as it ſeemeth by the Saxon Laws of that time. See the Laws of *Edgar. cap.* 1.

disposition, have arrogated the same wholly to the Temporal Courts; as though the Ecclesiastical Judge could not as well discern what two or three honest men depose and say as concerning the limits or bounds of a Parish, as twelve mean men of the Country who are upon like depositions, to give up their verdict. But for the limits of Bishopricks, I acknowledg that they are Temporal, for that they were not primarily designed out by Ecclesiastical men, and their direction, but were assigned to Provinces, or Shires, first described and distinguished by Princes; but for Parishes, neither reason nor antiquity concurs with them, that they should be temporal, or that they should be usurped or challenged to be of the temporal cognisance.

And so much for these prohibitions, which they commonly frame out of the 27. and 32. of *Henry* the eight, nor that there are no more but these, but that having a tast of these, there may be like Judgment made of the rest.

CAP. II. SECT. V.

That the clause of the treble Damages in the 13. chapter 2. Edward the sixth is to be sued in the Ecclesiastical Courts onely.

OUt of the Statute of the 2. of *Edward* the sixth *cap.* 13. they raise many prohibitions, the first whereof in order of the Statue, although the last in practise, is the prohibition of treble damages, upon

upon not dividing and ſetting out Tythes, or at leaſt for the not compounding for them before they be carried away: Which forfeiture they ſuggeſt, and thereupon bring a Prohibition, and ſo draw the whole Suit of Tythes into their Courts, contrary to the true meaning of the Statute, which would have thoſe treble Damages, in caſe of not juſtly dividing and ſetting out, or not compounding for the Tythes before they be carried away, be no leſs recoverable before an Eccleſiaſtical Judge, according to the King's Eccleſiaſtical Law, than the forfeiture of double value (by the letting and ſtopping of them to be carried away, whereby they are loſt, with the coſts thereon growing) is remediable at the ſame Law; for albeit the clauſe which is to redreſs this wrong, be put after that part of the Statute which concerneth the ſtopping and letting of Tythes to be carried away; yet when there is a great reaſon that it ſhould ſtretch it ſelf to the firſt branch of the proviſion as to the ſecond, and the ſecond branch hangs on the firſt by a conjunction copulative, and there is no heterogeny of diſparity in the matter, whereby it may not be as well verified in the one branch, as in the other, I ſee no reaſon why it ſhould not equally reſpect them both, according to the rule of the Law; *Clauſula inſine poſita refertur ad omnia præcedentia, nisi aliud ſit ſignificatum: quando non reſultaret intellectus contrarius juri*, as here it doth not: for the intendment of either branch of the Statute is, to procure by their ſeveral forfeitures, a juſt and true payment of Tythes, the recovery whereof, as the preciſe words of the Statute in one member, reſtrain unto the Eccleſiaſtical Law; ſo the Identity of reaſon in the other

C. 6. tit. 28. l. 1.

L. Illud ff. ad l. Aquiliam.

member doth confirm it unto the same Law; for where there is the like reason or equitie, there ought to be the like disposition or order of the Law.

Beside, if the principal cause it self be triable in the Ecclesiastical Court, why should not those things which hang thereon be tried in the same Court? for they are but as it were accessories to the principal, and so not only follow the nature of the principal, but also belong to the Court of the principal, and are determinable where the principal is; for otherwise happily there might fall out contrary sentences of one and the same thing, the one condemning, the other absolving.

Further, in that Court wherein the course of Justice is already begun, the cause may with the less labour and easier expences be ended, being for the most part determinable by one sentence, than that a new process thereof should begin before an other Judge, who knoweth little or nothing of the principal matter, and therefore cannot so easily decide the accessory.

Lastly, those which take this course, first to surmise a forfeiture, then to draw the original suit, whereupon the forfeiture grew into question, bring in a proceeding far different from the common style of all well-ordered Courts, in all Nations, among whom the connusance of the cause, and trial thereof goeth before, and the forfeiture or execution thereof followeth after: But in this *Hysteron proteron*, the execution is in the forward, and the trial is in the reteward: In which doing they deal much like

like as *Cacus* the Giant dealt with *Hercules*'s Oxen, who to the intent that *Hercules* ſhould not find what way they were gone, drew them backward by the tail into his Cave: but as that device ſerved not *Cacus*, but that *Hercules* had his Oxen again; ſo it is to be hoped, the Reverend Judges of this Land will not long ſuffer this ſubtilty to prevail; but as it came in like a Fox, and reigned as a Wolf, ſo in the end it ſhall die and vaniſh away like a vain Device, much like the deſtiny of *Boniface* the eighth? For the reverend Judges are not only to miniſter juſtice between man and man, ſo that every man may have his own, and none be oppreſſed by another, but alſo they are to carry an upright and indifferent hand between Juriſdiction and Juriſdiction; yea though themſelves be parties to the matter in queſtion, ſo that one Juriſdiction eat not up another, as the Locuſts in *Egypt* devoured up all the green things of that land.

CAP. II. SECT. VI.

That the naming of Law or Statute in a Statute, doth not make it to be of the Temporal cogniſance, if the matter thereof be Eccleſiaſtical.

ANother rendelvouz they make of the words of this Proviſo, (Law, Statute, Priviledg, Preſcription, or Compoſition Real) as though all which paſſeth under any of theſe Tearms muſt belong to the Trial of the Common Law, and not to the Cogniſance of the Eccleſiaſtical Law; and that for-

sooth, because these words and tearms are expressed in the Statute: which is much like unto that, as one would needs have a house to be Mr. *Peacock's* house, because he saw a Peacock sit upon the top thereof. But it is not the naming of a thing in Law or Statute, that makes it to be of the Temporal cognisance, or otherwise; but it is the nature or quality of a thing named, that rangeth it under the one Law or the other. So that if the matter ordered in the Law or Statute be Temporal, the cognisance shall be Temporal; if Spiritual, then the case is determinable in the Ecclesiastical Law: for this Proviso is not prohibitory, as the last Proviso of this Statute is, whereby Ecclesiastical Judges are forbidden to hold plea of any thing that is in the said Proviso contained; but it is rather directive, and sheweth where the Ecclesiastical Judge is to give way to immunities, and to pronounce for them: so that for any thing is contained in this Proviso to the contrary, the cognisance of these matters, especially, Priviledge, Prescription, and Composition, still remaineth at the Trial of the Ecclesiastical Law, as they did before this Proviso was made for Tythes, and other Ecclesiastical Duties, as may appear by the several Titles in the same Law hereon written.

De præscript. l. 2. tit. 26. De Privileg. l. 5. tit. 33.

And for the other words, [Law and Statute] therein mentioned: (when as the King hath two Capacities of Government in him, the one Spiritual, the other Temporal; and his High Court of Parliament, wherein Laws are made, doth stand as well of Spiritual men as Temporal men; and so ought

ought to ſtand in both Houſes, if the ancient Book *De modo tenendi Parliamenti* be true and authentical, which makes the Upper Houſe of three States, the King's Majeſty, the Lords Spiritual, and the Lords Temporal; and the Lower Houſe in like ſort of three other, the Knights, the Procurators for the Clergy, and the Burgeſſes: and his Majeſty hath within this Realm as well Eccleſiaſtical Lawyers as Temporal, which are no leſs able to judge and determine of Eccleſiaſtical matters, than the Temporal Lawyers of Temporal buſineſs) It is not to be imagined, but as his Sacred Majeſty will have thoſe Laws to be held Temporal, and to have their Conſtructions from Temporal Lawyers, which are made and promulged upon Temporal Rights and Cauſes; ſo alſo his Highneſs pleaſure is, and ever hath been of all his Predeceſſours, Kings and Queens of this Land, that ſuch Laws and Statutes as are ſet out and publiſhed upon Eccleſiaſtical Things and Matters, ſhall be taken and accounted Eccleſiaſtical, and interpreted by Eccleſiaſtical Lawyers, although either of them have interchangeably each others voice in them, to make them a Law.

And that the King doth infuſe life into either of the Laws, when as yet their ſubſtance is unperfect, and they are as it were Embryons, is in Temporal Matters, by his Temporal Authority, and in Spiritual Matters, by his Spiritual Authority; for to that end he hath his double Dignity in that place: as alſo the Eccleſiaſtical Prelates ſuſtain two Perſons in that place, the one as they are Barons, the

other as they are Bishops: So that even the Orders of the House do evince, that there are two sorts of Laws in that place unconfounded both in the head and the body, although for communion sake, and to add more strength to each of them, the general allowance passeth over them all. And as they rest unconfounded in the creation of them, so ought they to be likewise in the execution of them; and as the Temporal Law sorts to the Temporal Law, so the Spiritual Lawyers Statutes should be allowed and allotted unto the Spiritual Lawyers.

And as the nomination of these words Law or Statute in this precedent Proviso, makes not the Law or Statute Temporal, but that it may remain wholly Ecclesiastical, by reason of the Spiritual matters it doth contain, and the power of him that quickneth it, and poureth life thereinto: so much less can the inserting of these Terms, Priviledges, Prescriptions, or Composition Real, intitle the Common Law to the right thereof, or the Professors of the said Law to the interpretation thereof, for that matters of these titles so far as they concern Tithes, and other Ecclesiastical duties, have been evermore since there hath been any Ecclesiastical Law in this Land (which hath been near as long as there hath been any profession of Christianity with us) of Ecclesiastical Ordinance, neither ever were of the Temporal Cognizance, until now of late, that they transubstantiate every thing into their own possession; as *Midas* turned or transubstantiated every thing that he touched into gold.

CAP.

CHAP. III.

SECT. I.

How it comes to paſs, that when Tythes were never clogged with cuſtome, preſcription, or compoſition under the Law, they are clogged with the ſame under the Goſpel, and the cauſes thereof.

BUt here it will not be amiſs to enquire (ſince Tythes came in at the beginning of the primitive Church, within a little time after the deſtruction of *Jeruſalem*, and the ſubverſion of the Jews policy, unto the Chriſtian Church and Common-wealth, void of all theſe incumbrances, as ſhall appear after by the teſtimony of ſundry of the ancient Fathers, (which were near the Apoſtles time) how it comes to paſs (ſince Tythes are no leſs the Lords portion now, than they were then, and in the Patriarchs time before them) that theſe grievances have come upon them more under the Goſpel than ever they did under the Law: for then never any Lay-man durſt ſtretch out his hand unto them to diminiſh any part thereof, but he was charged with robbery by the Lord's own mouth; and in puniſhment thereof, the heavens were ſhut up from giving rain unto the earth; and the Palmer-worm and Graſs-hopper were ſent to devour all the green things upon the earth. And for Eccleſiaſtical-men, it is not read any where in the Scripture, that ever they attempted to grant out any priviledge of Tythes to *Malach.* 3.

any person, other than to whom they were disposed by the Law, or to make any composition thereof between the Lay-Jew, and the Lords Levite: every of the which have been not only attempted against the Church in Christianity, but executed with great greediness; so far worse hath been the state of the Ministry under the Gospel, than was the condition of the Priests and Levites under the Law.

CAP. III. SECT. II.

That the Causes are two-fold: First, The Violent Intrusion of Lay-men: And secondly, The over-much Curiosity of School-men. And first, The first Cause; and therein concerning Charles Martel's *Infeudations, and the Violent Prescriptions ensuing thereupon.*

THe beginning whereof, although it be hard for me to find out, because there is small memory thereof left in Stories; yet as far as I can by all probabilities conjecture, this great alteration in Ecclesiastical matters came by two occasions: the one by the Violence of the Laity, thrusting themselves into these Ecclesiastical Rights, contrary to the first Institution thereof; for when they were first received into the Christian world, they were received and yeilded to for the benefit of the Clergy only, as in former time under the Law, they had been for the use of the Priests and Levites only. The other was, the too too much curiosity of School-men, who being not content with the simple enter-

entertainment of Tythes into the Church, as the Ancient Fathers of the Primitive Church received them, would needs seek out how, and in what right, and in what quantity this Provision belongs unto the Church, wherein they did by their over-much subtlety, rather confound the truth than make that appear which they intended to do. By the first of these was brought in that great Prescription, which is called the Prescription beyond the *Lateran*-Councel, whereby Lay-men held Tythes in Fee, without paying any thing therefore unto the Church; and out of that issued the rest of those petty Prescriptions, which we now have, which are nothing else but imitations of the first. By the second came in Priviledges, Customes, and Compositions; or if they came not in wholly by them, yet surely were they much strengthned by them; but of either of these after in their places. But for that all these forenamed grievances in the Church, as far as my reading serves me, Prescription is the eldest and first thrust into the Church, and violated the liberties thereof: I will first begin thereby, and shew upon what occasion it first seized upon the Church, and prevailed against her; and then I will speak of the rest in order.

It is out of question that from the time of *Origen*, who lived within four score years after the death of St. *John* the Evangelist, as also did *Cyprian*, who was his coequal in time, and so along by the ages of *Chrysostome*, *Ambrose*, and *Augustine*, and some of the purer Popes, as *Urban* the second, *Dionysius*, and *Gregory* the Great, there was good use of Tythe

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in the Churches where Christian Religion was embraced, as may appear by every of their testimonies, that God had not appointed it to be a provision only for such as served at the Altar under the Law, but also was purposed by him from the beginning to be a maintenance for the Ministry under the Gospel: and therefore *Origen* in his Eleventh Homily upon *Numbers*, speaking of Tythes, saith thus, I hold it necessary that this Law or Precept be observed according to the letter: and upon the 22. of *Matthew*, he thinketh Christ's words uttered there as concerning Tythe, to be a Precept no less necessary for the use of Christians, than they had been for the Jews: and therefore he accounteth Tythe neither ceremonial, nor judicial, but moral and perpetual. *Cyprian* in his Sixty sixth Epistle, adviseth the Clergy of his time, since they had Tythes allotted unto them for their maintenance, they should not absent themselves from God's service. *Chrysostome* upon the Eighth of the *Acts*, useth this Argument to perswade Husband-men to pay their Tythes truly unto the Church, That it is good for them so to do, for that there are continual prayers and intercessions made for them by the Ministry. *Jerome* upon *Timothy* saith, The precept of payment of Tythes, is as well to be understood in the Christian people, as in the Jews. Read *Ambrose* in his Lent Sermon, and *Austine* in his Forty fourth Homily, and *Gregory* in his Sixteenth Homily, and you shall find no less plain places for the continuance of the payment of Tythes among the Christians, than the former were. Add to these the practise of *Dionysius*

nysius himself, who by *Jerome's* account flourished in the year 266. who not only divided out Parishes, drawing the example thereof from Saint *Paul*, who first appointed Bishops in Cities, but also assigned orderly to every Parish his Tythes. All which held in the Christian Common-wealth, in a decent and comely sort, until the irruption of the *Huns*, *Goths*, and *Vandals*, upon the Christian World, who first invading *Italy*, under the Emperor *Justinian*, did for many years so harrow the whole Country, and especially *Lombardy*, as that they left not almost a man of excellent Religion any where unpersecuted, overturn'd Churches, burnt Libraries, overthrew Schools of Learning, and to be short, what wickedness did they not? insomuch as *Gregory* the Great, being otherwise a very good man, and one that did rely himself upon the Providence of Almighty God, verily thought and taught that the end of all things was then come: but after those fierce and barborous People once set their face to go against *France*, (which had been hitherto free from that inundation) which happened in the dales of *Theodorick*, who lived about the 650. year of the Incarnation of our Saviour Jesus Christ, *Charles Martel* the Father of *Pipin*, after King of *France*, being then Great Master of the King's House, would not (although otherwise he were a

Hospinian de orig. Monach.

* Concerning *Charles Martel* we find in Story thus: That though he was a man of a rare and war-like spirit, and vouchsafed great protection to the perilous times he lived in, yet also we finde, that he gave occasion to many miserable inconveniences to follow, by suffering himself to be so notorious and unusual an example of Sacriledge. For when his great Design against the *Saracens* stood in agita-

agitation, he refused to put himself upon so Desperate an Attempt, unless the Clergy would yeild up their Tythes and Maintenance for the time being towards the Expence of the War. This Condition the Clergy accepted of, moved thereto by the Exigencies of the Age, and the faire Pretence of *Martel*; who promised that he would Restore all again, and that with ample Interest; but that *Charles* never did this, these dates can testifie to those. This Fact of *Martel*, if it were so, was Execrable; and if it were not, yet the Opinion of it hath been so harshly entertained by Tradition, that we finde him confidently Damned in the Legend. And this Story of his Damnation is fastned upon *Eucbere* Bishop of *Orleance*, who is said to have seen in a Vision this *Martel* in Hell-torments: and that *Eucbere* might believe what he saw, an Angel instructeth him to seek for *Martel* in his Sepulchre; and so he did, but he found him not; but he found the place all black, and instead of *Charles* a direful Serpent. See the Annals of *Orleans*. Concerning the Damnation of *Martel*, we have nothing to say, what may be thought of the Vision shall hereafter be enquired: This is certain, and believed by all, that this *Charles* was a great Oppressor of the Church. For to let pass that of *Hincmare* Archbishop of *Rhemes*, *Gregory* of *Tholous*, *Sigebert*, and others, it is observable, that this could not be omitted by *Duplcix* himself, one of the greatest Friends that ever *Martel* shall finde in History: For though this Author in one place, spending his Credit upon the Admiration of *Charles*, setteth him in the same Line with *Julius Cæsar*, and Great *Alexander*, warranting him to be *Sans doubte le plus grand homme que la France ait jamais produit*; yet elsewhere he could not deny, that *Il avoit banni aucuns Eveſques de leur ſieges & mis en leur place des hommes lais*; he had thrust Bishops out of their Sees, and put Lay-men in their places: and to make up the Complement of this Sacriledge, he spared not the Bishop of *Rheims qu'il avoit leves des fonts de Baptiſme*, as *Fauchet* hath observed. To weigh down this grand Impiety, *Dupleix* bringeth into the Scale *cent mille ames*, an Hundred thousand Souls converted to Christianity by the help of this *Charles*; but the Conversion was wrought by the Arch-bishop of *Mentz*, and if it were promoted by *Martel*, it was well: yet his Son *Pipin* thought this satisfaction too little, and therefore *voulut eſtre inhume le ventre & la face contre terre pour l'expiation des pechez de ſon Pere*; he would be enterred with his face and belly downwards, to expiate his Father's transgressions; as *Dupleix* also was contented to observe: and it is to be found in the Antiquities of *France*.

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Therefore *Charles Martel's* Sacriledge in general muſt be granted: but it hath been alſo conſtantly received, that in particular this *Charles* defended the Church of her Tythes, as hath been ſaid; but this paſſage of the Story hath found ſome oppoſition. One of the firſt that ever ſhewed himſelf an Adverſary to this Opinion was *Stephen Paſquier*, a man whom though we forſake in this particular, yet we may ſafely commend for his variety of Learning otherwiſe, an ample teſtimony whereof he hath given in his Book *De Recherches de la France*; ſaving that he cannot be pardoned for his harſh and envious mind towards the Dignity and Juriſdiction of the Clergy, which diſcovereth it ſelf in ſeveral paſſages of his Third Book. In the ſame Book, Chap. 35. which is, *Des Diſmes Infeodees*, Concerning the Infeudation of Tythes, he adventureth to overthrow the received Opinion. The main Reaſon he urgeth (as far as I conceive him) is, for that thoſe who firſt and anciently wrote the Hiſtory of their Kings, or otherwiſe took notice of the Acts of *Charles*, do not accuſe him of any ſuch Infeudations: But to this, I ſuppoſe, ſome Anſwer may be conceived in this matter.

The principal Hiſtoriographer, of whom we are to conſider in this caſe, muſt be *Aimoine*, who wrote the Story of the *French* Kings, and what was delivered in his Chronicle concerning the times we aime at, for the moſt part, made up the Books of thoſe Writers that ſucceeded for ſome certain centuries of years. This *Aimoine* (*Stephen* ſaith) maketh no mention of that Act of *Martel*: 'Tis true, neither maketh he mention of any Sacriledge at all, no not ſo much as *Stephen* himſelf, and all Writers believe that *Martel* was guilty of. And I ſhould wonder if he had, for *Aimoine* lived in the time of *Charles* the Great; and what he wrote concerning him and his Anceſtors, he received from *Autmare*, Chaplain to the ſaid *Charles*, and this is too near the time of *Martel* for a true Hiſtorian. Indeed the Lives of Pious Princes may be written before their Deaths, and if there happen an unworthy Paſſage, it is not corrected in their Story, but in their Converſation: But when a great King proves not good, his firſt Hiſtorians muſt be worſe; for no Subject may dare to write what ſuch a Soveraign could commit. And therefore if an ill Act occur, the Hiſtorian muſt diſſemble, or defend it: for what e're be after thought of Great mens Actions, yet when they are newly done, either they muſt not be mentioned, or if they be, they muſt be magnified. Therefore *Autmare*, who depended upon *Charles* the Great, muſt not tell ſuch Tales of his Grand-father. And for this cauſe it is, that when

Aimoine

Aimoine speaketh of *Martel*, he styleth him *virum sagacissimum*, and *virum egregium*, adding moreover, that his Atchievements were accomplished *Christo in omnibus præside*. See *lib.* 4. *cap.* 57. where also reciting his Victories, he compareth the siege of *Avignon* to that of *Jericho*, as if *Charles* had marche on like those great Commanders of *Israel*, and the walls of *Avignon* had fallen down like those of *Jericho* at the very sound of *Martel's* Trumpets. Thus *Aimoine* observes the times he lives in. So *Boniface* Arch-bishop of *Ments* in *Martel's* daies, though perhaps he could have said more then he did, if that be not enough which he hath said, that this *Charles* was *Ecclesiasticarum pecuniarum in proprios usus commutator*; yet that which he did say seemeth to have been no otherwise publickly known, than in an Epistle of his to *Ethelbald*, one of our *Mercian* Kings; a fragment whereof is inserted into the Story of this *Ethelbald* by *William of Malmsbury*; but in other Copies of this Epistle, the clause which concerneth *Martel* occurreth not; for of late daies, by the great industry of *Serarius*, we come to see a Volume of that Arch-bishops Epistles, the nineteenth whereof is that which was directed to *Ethelbald*. But there the passage of *Martel* cannot be found. And the truth must be, that if *Boniface* have any such thing to say of *Charles*, he must send it far enough; for it might not be told at home.

That which hath been said may pass for a reason, why so great a crime of *Martel* was not so publickly recorded till time could weare out the danger, and the Historian could write the Act with as much confidence and security as *Martel* did it. Therefore it is, that though the Writers began betimes to touch at this Impiety, yet they struck not at this Master-piece but by degrees.

Paulus Æmilius, a diligent Writer, and one that spent thirty years to compile the *French* Story, seemeth even in those daies to report this timorously, as if it had been then too soon to give a just account of this Sacriledge: For when he cometh to *Charles Martel*, he saith, that there passed upon him a diverse rumour, For some gave out *Eum omnium Ducum Imperatorumque gloriam transcendisse*; that he had transcended the Renown of all Kings and Captains that ever were before him. Others reported that he had *Decumarum sacrum jus militaribus viris attribuisse*; given over the Divine Right of Tythes to his Military-men. But it is necessary for the Reader to observe, That the Authors of the first report were (as St. *Paul* saith) *Summi viri*, Great men; but those that related

the

the ſecond were *Sancti viri*, Good men: and the firſt ſort may, but the latter ought to be believed. But we ſhall find this matter more confidently reſolved by the *French* Hiſtorians, who ſpare not to ſet it down plainly and ingeniouſly, though it concern their Story more than others that this *Martel* ſhould be blameleſs.

An ancient Chronicle of theirs, *Le Rozier Hiſtorial de France, part.* 2. concerning this paſſage, ſaith thus, *Par le conſeil des Eveſques luy furent donnez les diſmes des Egliſes pour gaiger ſes chevaliers, qu'il promiſt rendre & faire de plus grans biens a l'Egliſe s'il vivoit longuement. Fol.* 21. He ſaith, That *Charles* did beſtow the Church Tythes upon his Knights, and that he promiſed to reſtore them again, and much more; but this muſt be *s'il vivoit longuement*, if he lived long enough. How long *Charles* would have lived to do this, I know not; but that he lived not ſo long as to ſee it done, we are ſure enough. The like is reported concerning this paſſage by *Nicholas Giles*, but becauſe this Author hath been corrected and enlarged by *Belleforeſt*, we ſhall uſe his words, and they are theſe, *Pour fournir aux fraites & diſpenſes qu'il convenoit faire pour leſdictes guerres que ledict Charles Martel avoit contre les Sarazins ennemis de la Chriſtienté ledict Charles Martel par le conſeil des Princes donna & bailla aucunes des diſmes que tenoyent les Egliſes a ſes gens d'armes moyennant qu'il promit que ſi Dieu luy donnoit tant de grace de venir au deſſus des dictes Sarazins il les reſtitueroit & plus grands biens y donneroit, &c.* ſee that which followeth in the Author. The ſame is the relation of *Du Tillet*, *On feinct qu'il eſt damné en enfer pource qu'il eſt damné en enfer pource qu'il print quelque partie des diſmes pour aucunement ſatisfaire aux Nobles, &c.* Thus alſo *Seigneur Du Haillan*, *Il donna les diſmes*; He gave the Tythes to his Nobles, and he promiſed to reſtore them again: but *Du Haillan* addeth, *Ce qu'il ne peut toutefois faire comme il avoit promis.* To the ſame purpoſe *Fauchet* in his *Antiquites & Hiſtoires Gauloiſes. Livre cinquieſme, chapitre* 21. *Leur oſtant une partie des diſmes pour advantager la Nobleſſe de ſon partie*: yet he ſaith, there were that would excuſe this, *diſans que ce fut pour s'ayder en la neceſſitie des guerres qu'il eut contre les Sarazins.* This indeed may ſerve to excuſe him for taking the Tythes, but it yeildeth no preſence for his not reſtoring of them. And becauſe it is below this Sacrilege to admit of any excuſe, therefore *Charles*'s great friend *Dupleix* ventureth to defend it. This *Dupleix* was a later Writer than the reſt, and one that hopeth to be accounted a better, as it ſeemeth

by

by the Censure, which in his Preface he passeth upon those who wrote before him. But let us hear what he saith in defense of *Martel*: *D'ailleurs ils furent encore plus offenses de ce qu'apres la journee de Tours* (So the French call this Expedition of *Charles*) *il recompensa la Noblesse de partie des dismes du Clergé avec promesse de restitution: de laquelle depuis il ne tint compte. Mais en cela l' ingratitude & l' avarice du Clergé est plus blasmable que l'enterprise de Charles. Car n'estoit il pas raisonnable que ceux qui apres beaucoup de despence avoient exposé si genereusement leur vie pour la defense de l'Eglise fussent recompenses de quelque petit partion du revenu d'icelle? &c.* He granteth the passage: But saith he, In this the Ingratitude and Avarice of the Clergy is more to be blamed, than the Enterprise of *Charles*; for was it not good reason, that those who beside their Cost and Charge, had so generously handled their Lives for the Defence of the Church, should be rewarded with some small Portion of the Revenue thereof? &c. We Answer, that the Design it self was truly Honourable; but for *Charles* to free the Church from a foreign Foe, and be a Barbarian himself at home, maketh his Atchievement very improper, and utterly darkens the Reputation of so great a Conquest.

Thus we see, that it is generally believed by the *French* Writers of later times, that their *Martel* distributed the Church-Tythes to his Men of War, and without restitution. And if it be asked, From what head these Modern Historiographers could deduce that passage, whereof the Ancient had made no mention? It may be replied, That though this were not publickly recorded by the Old Writers, *Aimoine*, and the rest; yet it might remaine in the Notes of Private men, and being delivered from hand to hand, might be reserved for such a time as could endure the revolution.

But *Stephen Pasquier* saith, That the Centuriators of *Magdeburg* refer him to the second Tome of the Councels, for a Synod holden under *Carloman*, where amongst other Canons this was one, *Decimas ecclesiarum à prophanis restituimus*: And if this be true, he granteth all. *Il n'y auroit pas grande difficulte pour ceste opinion*: But he addeth moreover, that after diligent search made both for the Synod and this Canon, he could finde no such thing in all the four Tomes of the Councels. In that he searched for that very Canon, and found it not, he deservedly lost his labour, for taking no more heed what the Centuriators set down,

for

very victorious man, and valiant Captain) oppoſe himſelf againſt them, unleſs the underclergie of *France* would be content to reſign every man his Tythes into his hands, that thereby he

for they referred him not to theſe words of the Canon, but to this Councel in other words; but he ſaith, he could find no ſuch Councel, no not in all the four Tomes, but he muſt needs be deceived, for this Synod is not only extant amongſt thoſe four Tomes, but alſo in all the four Editions of the Councel. The ſecond Tome of the Councels to which he is referred by the Centuriators, is the ſecond of that Edition which was ſet forth at *Colen*, in the year 1538, and in this Tome is found that Synod under *Carloman*, though otherwiſe it muſt be looked for in the third Tome of the Edition of *Binius*, *Surius*, and that of *Venice*. The four Tomes he ſpeaketh of, are thoſe of *Binius*, and there he ſaith, he cannot find this Synod. But he deceived himſelf in this manner. In the Edition at *Colen*, the Synod is ſaid to be held under ſome *French* Biſhops, therefore the Centuriators might call it *Synodus Francica*, and ſo it was ſtyled afterwards in the Edition of *Surius*, and that of *Venice*: But in the Edition of *Binius*, this Councel goeth under the name of *Ratisbonenſe*, or *Auguſta vendelicorum*, and by this meanes *Stephen Paſquier* reading nothing but the Titles, came away with a *Non inventus eſt*. Therefore the Councel is extant, As for the Canon though it be not ſet down there in the ſame ſenſe (which is the moſt that can be ſaid) yet it is plainly expreſt by *Aventine*, from whom the Centuriators have it and there the Canon is *Decimas, bona Eccleſiaſtica occupata a prophanis reſtituimus lib. 3. pag. 216. Edit. Baſ. 1580.* If *Aventine* were deceived it need not be for want of judgment, and it could not be for want of care; for the pains he took to collect thoſe Annals, were prodigious and incomparable. *Multa* (ſaith he in his Preface) *tuli, feci, ſudavi. Et alſi, totam Bojoariam perluſtravi, omnia Contubernia Sacerdotum penetravi, ſcrinia, publicas Bibliothecas adivi, curioſus perſcrutatus ſum, libellos, chodicillos, donaria, Commentarios, veſtes Annales omnium gentium, diplomata, inſtrumenta, publica & privata evolvi: Signa ſacra, lapides, trophea, epigrammata ſepulchrorum, picturas, inſcriptiones, titulos, templa, omnia denique Antiquitatis monumenta exploravi, &c.* and that after all this care, *Aventine* ſhould not find out the true Copies, or not be able to diſtinguiſh them from the falſe, it is altogether incredible.

Therefore notwithstanding what *Stephen* hath said, it may might reward the Souldiers, and support the charges of the warre, then present: which the poore Clergie in respect of the eminent danger, and for that *Charles Martel* himselfe did solemnly vow and

seem very reasonable that wee believe *Charles Martel* to be the Author of the forenamed *Infeudations*, and that this is not without probability, *Steven* himselfe confesseth, where he saith: *A la verité ceux qui ont esté de cest aduis ne sont denuez de bien grand pretexte.*

However if these infeudations had not their Original from *Charles* (as they seem to have had) yet tis impossible they should begin where *Stephen* hath appointed, as it is observed by a most learned Writer of our own. *Cap.* 6. of his *Hist. of tythes pag.* 112.

The great opinion which hath been alwaies had of *Steven Pasquer's* learning, wee are most ready to acknowledge; but to abate any prejudice that may arise from this, we have reserved to compare with him two of his own Country men; the one is *Filesacus*, a most learned divine of *Paris*; the other is *Gregorie*, a great Civilian of *Tholous* either of these may be thought equal to *Steven* in learning, but they are both different from him in this opinion. *Gregorie* of *Tholous* in his *Syntag. Juris, &c. lib.* 2. *cap.* 25. *num.* 7. *pag.* 50. *Edit. Francofurt*, 1611. where he believingly reporteth this matter of *Martel* out of *Gaguin* and *Æmilius*; and having passed the Storie he accepteth also the vision of *Euchere*. His own judgment of both he delivereth in these termes: *Quod in ultionem tantæ usurpationis videtur accidisse, & ab sacrilegium Ecclesiæ illatum, cum nullus princeps, Rex, vel Imperator has decimas usurpare, minusque aliis concedere Laicis possit, &c.* So *Gregorie*. To the same purpose *Filesacus* in his *Querela Ecclesiæ Gallicanæ*, where, though he giveth us to understand, that there were Church-robbers before the daies of *Martel*, and that in this, *Italie* gave example to the *French*, yet in all the Sacriledge he giveth *Charles* the preheminence. And concerning the matter of Tythes thus he collecteth out of his old manuscript Chronicle, *Carolus propter assiduitatem bellicam decimas & quasdem alias res Ecclesiasticas Laicis concessit &c.* and having considered both of the Storie and the vision, he giveth this approbation, *Scripsit hoc P. Æmilius lib.* 2. *Hist. Franc, priscorum*

promise,

promise, that they should be forborne no longer, then for the time of the warre, and that they should be restored unto them againe at the end of the warre with a further gratuitie for their good

credo nostrorum aut nalium fide, Purpuratus Scriptor Ecclesiasticus.

historia pro Martello contra Æmilium & similes dixit, you may imagine my minde, I think he meaneth *Baronius*. Therefore see the Cardinals unsound opinion of *Charles Martel* at the yeare of Christ 741.

It remaineth to set down what we have to say concerning that vision of *Eucherie*, to whom it was shewed that *Charles Martel* was in Hell.

It was strange indeed that those inconceivable tortures of the damned could be made fantastical, and that which cannot be feigned should be seen in a vision: yet we may not think these latter times so incapable of a wonder, as not to admit of something that is strange, we need not go farre back for a prodigie; what think we of the Star in *Cassiopea*, which shewed it selfe in the yeare 1572. and the men are yet a live who saw it. An ordinarie Star it must not be for the Country Hinds had spy'd it first, and brought the newes to *Tycho*: a fixed Star it could not be, for such as those are above a twelve-moneth standing: that it should be a Comet, it cannot be granted, at leastwise not one of *Aristotles*, for all those are placed below the Moon, but this Meteor sublimated above all Planetarie Orbes, as it is evident by the uncontrolable doctrine of the Parallaxe: Or if we could suppose a Comet that were not sublunarie, yet neither could this be such a one, for all these must be raised out of terrestial matter; but if the whole earth had spent it self into one exhalation, it would have come farre short of making up so vast a body, as this Star must be, which exceeded those of the greatest magnitude, notwithstanding that the Earth is exceeded by those of the first. So long as the Star appeared, no man could say that the world wanted a wonder, and if we admit such things in the Celestial bodies, why should we exclude the inferiour world. Indeed if we be told by the Metaphrast, that the Crow stood and mourned over the dead Corps of S. *Vincent*, or that S. *Denis* after his neck was cut off, should run away with his head in his hand, we make no such

hast to be will yeilded most willingly thereunto, specially the
lieve it, yet Bishops are contradicting it, leaving to themselves
chus much a small portion of their living only, during the
faith we time of the danger whereupon *Charles Martel* un-
have, that
the blood

of Saints is so precious in the eyes of God, that a Martyr indeed sel-
dome goeth off without a miracle. True it is, that matters of this
ture were most frequent in the primitive times, yet if we should
mit nothing of this kind without Christ or an Apostle, all Stor
would be Legends, and almost every discourse too strange to be true.
But it seemeth very convenient for the satisfaction of reasonable Cre-
tures, that these things should be so, for if God did not sometimes
interrupt the common course, we should dote upon the ordinary means,
and begin to think that nature had no supreamer cause then it self.
If the Story of this vision should not be true (we will not say in
every circumstance for we have promised to doubt of the Damnation
of *Charles*; yet I say if something like to this hath not been) then
what shall be thought of all those ancient testimonies of grave and
learned men, who are engaged to make this good. To let pass the
rest, what shall we think of the Relation of *Fauchet*, that a Chro-
nologer should say, *Que de son temps plusieurs gens l' asseurayent
comme ayans este presens à la visitation de ladite sepulture & les Ar-
chevesques des Provinces, de Rhemes & Roaen assemblez en un parle-
ment tenu l' an huit cens cinquante huit l' alleguerent pour exemple à
Loüys Roy de Germanie comme histoire veritable adjoustans que Charles
estoit damné.*

That we may know what *Fauchet* saith, we must observe, that in the
year 858 the Bishops that then were of *Rhemes* and *Roan* were summoned
to a Council by *Lewis* the third, but fearing (for good causes) what the
success might be, they appeared not, nevertheless they wrote an Epistle to the
Emperour, where, amongst other matters, advising him to vindicate
the Church, they peremptorily alleaged the damnation of [illegible]
that when he was look't for in his grave by *Boniface* and [illegible]
could not be found, but that instead of him there issued forth a fearfull
Dragon, leaving the place all black, as if it had been burn'd. And
that the Emperour might make no doubt, they enforce the credit of the Story
which this undeniable testimony. *Nos autem illos vidimus (nempe Bonifacium*

dertaking

dertaking the enterpriſe, got a mighty great victory againſt the enimies inſomuch that he ſlew in one battel 34500. of the Infidels: which battel being happily atchieved, and the danger of the warr being paſt the poor Clergy-men hoping to receive again their Tythes, according as it was promiſed them by *Charles Martel*, they were put from the poſſeſſion thereof, and ſay or do what they could, their benefices were divided before their face, in recompence

& Fulradum) qui ad noſtram uſque ætatem duraverunt, & nobis viva voce veraciter ſunt teſtati quæ audierunt & viderunt.

The entire Epiſtle is extant, and the preſervation of it we ow to the learned *Baronius*, in whoſe Annals we may find it ad *Ad unum Chriſti* 858. So much of it as concerned the Story of *Martel*, was cited by *Gracian* 16. *q.* 1. *poſt Can.* 59 It is alſo related by *Marianus Scotus ad annum Chriſti* 764. but not to be look't for in the printed Copies, for we read it in a manuſcript of our publick Library, which hath much more of *Marian* to ſhew than ever yet came forth, for it exceedeth theſe that are printed by a third part; and (which is more to be noted by us) it is conſtantly interpoſed with the Synchroniſmes of our own Story. Yet it would be enquired, whether *Marian* be author of all that he is there entituled to, becauſe at the year 1054. pag. 351. the manuſcript ſaith thus, *Eodem anno natus eſt Marianus Hibernenſis probabilis Scottus, cujus ſtudio & labore hoc Chronicon præcellens eſt de diverſis libris coadunatum.*

The *French* Hiſtorians, for the moſt part, diſparage this viſion for fear of *Martels* Damnation, yet *Nichol. Gills* in *Belleforeſt* relating the Story concludeth it with a ſober demure, *Mais ce qu'il-ya eſt je ne ſcay rien ceſt à dieu ale ſeavoir*: But, ſaith he, what to think of this I cannot tell, God he knoweth.

But of *Charles Martel* thus far, this only may briefly and confidently be added, That as he came improperly into the world, ſo he went unuſually out; for he was born a Baſtard and dyed miſerably.

of their ſervice, to ſuch of the Nobility as had done valiantly in that Action, and the ſame aſſured to them, and theirs for ever in fee. And this is the firſt violence that ever tythes ſuffered in this Chriſtian world, after they left the Land of *Jurie*, and and came to inhabite among the Chriſtians: which albeit was a nefarious act, and nothing anſwerable to the late mercie that God had vouchſafed them in conquering of their enemies yet there wanted like ſacrilegious minds in all Chriſtian Lands, which did imitate this wicked fact of *Martell*, inſomuch as the example hereof paſſed over the *Alpes* into *Italie*, and mounted above the *Pyrenæan* Hils into *Spaine*, and within a ſhort time after ſayled over into *England*, in ſuch ſort that even to this day ſundry monuments appear every where in the Land, where any title of immunitie is any where challenged from payment of Tythes, reaching beyond the *Lateran* Councel which can deſcend from no other head, then from that fact of *Charles Martel*; neither was there any redreſs thereof until the ſaid *Lateran* Councel before mentioned, which notwithſtanding came neer five hundred and threeſcore yeares after the Nativity of our Saviour Jeſus Chriſt; but the Councel that reformed it, and was holden under *Alexander* the third was not celebrated before the yeare of the incarnation 1189. neither was the reformation thereof at that time totall, nor ſuitable to the firſt inſtitution of Tythe among Chriſtians.

For neither could many willful or refractarious per-

perſons be then brought to obey the Canons of the Councel in reſtoring any part thereof again unto the Church, although they were charged ſo to do under pain of * damnation. Neither did all

* Irreligious people have alway been ſo backward to do the

Church this great right, that they have been oftentimes overtaken with the curſes both of God and Men. Several *anathema's* out of Several Synods might be urged, but the moſt notable proceeding againſt this Sacriledge may be found in the *General ſentence* of Execration, denounced four times a yeare. Something to this purpoſe was ſaid before *Chap.* 2. *Sect.* 1. out of an ancient book which I have, where thoſe Church-robbers are branded with the **More** and the **Leſſe Curſes.**

It remaineth, That in this place we declare that matter more fully out of the Engliſh **Feſtivall** and out of the Articles of the **General greater Curſe**, found in S. *Pauls* Church at *Canterbury*, in the yeare 1562. according as it is related by *Thomas Becon*, in the Reliques of *Rome*. And firſt we will obſerve what our Anceſtours underſtood by theſe kinds of Execrations, and what was their **More** and **leſſe Curſe**. The Feſtivall ſaith, that **Curſing is ſuch a vengence-taking it departeth a man from the bliſſe of Heaven, from houſel ſhrift, & all the Sacraments of holy Church. and betaketh him to the Devill, and to the paines of Hell without end**: The *Canterbury* Book ſaith thus: **Wherefore ye Shullen underſtand at the beginning, that this word Curſe is thus much to ſay, as departing from God and all good works. of two manner of Curſing holy Church telleth, the one is cleped the Leſſe Curſe, the other is cleped the More Curſe: That we clepen the leſſe Curſe is of this ſtrength that every man & woman that falleth therein, it departeth him from all the Sacraments that been in holy Church that they may none of them receive till they bee aſſoyled, &c.**

The More Curie, is much worse and is of this strength

such as did then restore them to the Churches from whence they are taken, which had been most agreeable to the ordinance of the Church, set for to depart a man from God, and from all the holy Church, and also from the company of all Christen folke never to be saved by the passion of Christ, ne to be holden by the Sacraments that been done in holy Church, ne to have part with any Christen man, &c.

Concerning those that debarre the Church of any rights or dues whatsoever, the Priest in the Festivall pronounceth thus: By the authority of God, and the Son, and the holy Ghost, and his glorious Mother and Mayden our Lady Saint Mary, and the blessed Apostles Peter and Paul and all Apostles, Martyrs, Confessours, and Virgins and the hallowes of God I denounce and shew for accursed all those that franches of holy Church breake, or distrouble or been against the State of holy Church, or thereto assent with deed or councell. And also all thoe that prieve holy Chuch of any right, or make of holy Church any Layfee that is halowed or sanctified. And all thoe that withold the rights of holy Church, that is to say, offerings, tythes, rents or freedomes of holy Church let or distrouble, or break, that is to say, if any man flee to the Church or Church-yard, who so him outdraweth, and all thoe that to procure or assent. And all thoe that purchasten letters of any Lordes Court, that processe of right may not be determined or ended. And the *Canterbury* Book saith: all thoe been accursed,

down

down by *Dionyſius*, who firſt divided Pariſhes and aſſigned them Tythes as hath been aforeſaid; and alſo the Scripture it ſelfe, *Deut.* 18. from whence

that purchaſten letters of any lordes Court or to let the proceſſe of the Law of holy Church of cauſes that longen ſhilfully unto Chriſten Court, the which ſhould not be demed by none other law, &c. And all that malicyouſly bitiben holy church of her right, or maken holy church Lay-fee, that is, halowed and bleſſed. And alſo all thoe that for malice or wrath of Perſon, Vicar, or Prieſt, or of any other, or for wrongfull coverysle of himſelfe with-holden rightfull Tythes and offerings, rents or mortuarys from her own Pariſh church, and by way of coverysle falſely the gaine to God the worſe, and to hemſelfe the better, or elſe turne them into another uſe, than hem oweth, or done hem in other place after their own will, ſo that they be not done to the ſame place that they ſhould be, or let by word or by deed any man or woman for to do her good will and her devotion to God, and to holy church. For all chriſten men and women been hard bound upon pain of deadly ſin, not onliche by the ordinance of man, but both in the old Law and alſo in the new Law for to pay truliche to God and holy Church, the tyth part of all manner of encreaſe that they winnen truliche by the grace of God, both with her travell and alſo with her crafts, whatſo they be truliche gotten. Alſo the tyth part of all manner of fiſhes, and foules, and beaſts both wild and tame. And all manner of fruites that growen out of the earth. Alſo all that wittingly or wilfully tythen falſly, that is to ſay, that given

Dionyſius

not to God and holy church the tenth part of every

Dionysius took his light to divide Parishes and dispose of Tythes as he did, by which it was not lawfull for him that paid his Tythes to pay them to

wynning lefully wonnen in merchandise, or in any other crafte withdrawen only the expence and the costage that needfully must be made about the thing whereof the winning is getten, not tything the winning of one merchandise with the losse of an other. And all thoe that of the fruite of the earth, or of beast or of any thing that neweth in the yeare, given not the tythe wholy without any costage. All thoe that falsly tythen taken to God the worse, and holden the better to her own profit, against the ordinance of Boniface sometime the Archbyshop of Cantorbury: by the which ordinance throughout the Province of Cantorbury shuld be one manner laying of tythes in this manner wise. Of all manner of fruites of earbis, of gardens withouten any manner of cost abatting: of hey wherever it groweth, in great medes or in small as oft as it neweth: of newing of all manner bestial, of calfe, or of lamb from seaven upward into tenth: and from fix downward for every hem an halfe penny: but if the Person or Vicarye will abyd an till another yeare, and tell thilk that leeven, and take the other beast that followeth: of wool that is woxen, of fellis fro purification of our Lady, of milk all the while it neweth, as well in winter as in sommer, but if they do agree therefore to the person, or to the Vicary for the profit of the holy church of fishing, of fowling, of venelon, of been of all other good rightfully wonnen, that newen by the yeare of profit of mills and weris, of fishing no cost abate but to the very value shall the tythe be payd: of iesewys, communys, severalls, shall the tythe truelyche be payd, after the number of the beescis, or the days as it is most profit to holy Church, all werkemen and chapmen that wynnen on her craftes, and on her merchandise shulen truelyche pay her tythe to God and to holy Church. Also Carpenters, and Smiths and weeveris, and all other crafty men, and all other hired men and wimen shulen Tythen of all they getten but if they wulle give any certaine there of to holy Church at the Persons or Vicars will. Also of fowle, of Piggs of Gees of Hennes, of Flax, of Hempe, of Corne, and of all thing that neweth

the

the Priest or Levite that dwelt in the place where himselfe made his abode: but yet this liberty that was given them by the Councel, then gave by the peare. Also of Greyning of Trees,

and of all manner of underwood worin or hewed. Also men of holy Church moune curse by name hem that wolen not pay her Tythes as it is written in many places of the Law of holy Church.

At the repeating of these Articles, the Prelate standeth in the Pulpit in his Albe, the Crosse being lifted up, and the candles lighted. After the Repetition, these or the like formall Words of Execration are denounced. *Ex Authoritate Dei Patris Omnipotentis beate Marie Virginis & omnium Sanctorum, excommunicamus, anathematizamus & Diabolo Commendamus omnes supradictos malefactores. Excommunicati sint, anathematizati, & Diabolo commendati; Maledicti sint in villis, in campis, in viis, in semitis in domibus extra domos, & in omnibus aliis locis, stando, jacendo, surgendo, ambulando, currendo, vigilando, dormiendo, comedendo, bibendo, & aliud opus faciendo*: Or as the Canterbury Book saith: But thorow authoritie of our Lord God Almighty, and our Lady S. Mary, and all Saints of Heaven, of Angels, or Archangels, Patriarches, and Prophets, Evangelists, Apostles, Martyrs, Confessors and Virgins, also by the power of all holy Church, that our Lord Jesu Christ gave to S. Peter, we denounce all those accursed that we have thus reckned to you: and all that that maintaine hem in her sins, or giben hem hereto either helpe or councell so that they be departed from God and an all holy Church, and that they habe noe of the passion of our Lord Jesu Christ, ne of no Sacraments that been in holy Church, ne noe part of the prayers among christen folke, but that they be accursed of God and of holy Church from the sool of their foot unto the crown of their head, sleaping and waking, sitting and standing in all her wordes, and in all her workes, and but if they have grace of God for to amend hem here in this life, for to dwell in the pain of hell for ever withouten end (*Fiat, Fiat*) Doe to the Book, Quench the Candle, Ring the Bell: Amen, Amen.

This general Sentence was solemnely thundered out once in every Quarter, that is (as my old book saith) the first Sunday of

cause

Advent at coming of our Lord Jhesu Christ, the first Sunday of Lenten. The Sunday in the Feste of the Trinite, and the Sunday within the utas (octaves we say) of the blessed Virgin our Lady S. Mary.

cause unto the errour that the Common Lawyers hold at this day (not knowing the ancient proceedings of the Church in these cases) that before

Thus much we have set down concerning the General curse, not hoping to fright any man into devotion with this (black Sentence) or to propose such distempred pietie for an example, but that it might be considered how horrible a crime it was in our Forefathers account to rob the Church in the least particular And indeed they conceived no more hope of a man that dyed under this *Damnosum Theta*, then of him that dyed in a mortal sin, nay much lesse; for the *Canterbury* Book saith that many Clerks meven at the day of dumme unto our Lady Saint Mary, and Saint John Baptist, and all Saints that been in heaven kneele down at once before the blessed face of Almighty God they shulen not in that time thorow the prayer of them all deliver the Soule of man or woman that dyeth in deadly sinne, &c. And if the day of dumme shall be so hard to all those that dy in any deadly sin by all reason full much harder shall it be at that time with all those that be founden openly cursed of God and of holy church, &c.

Thus we see what furies followed this Sacrilege in the opinion of our Forefathers, who were so confident that a Church robber could not escape the Judgment of God, that they delivered him over to Satan, or as they say, cursed him with the More, and with the Lesse curse, with Bell, Book and Candle.

The Clergy of the present time gives better language than thus what cause they may have, I will not say: It may be accounted for wisdome, that their injuries cannot be judged by their clamours, ye the Ages to come must not say that these thing were done *Nobis dormientibus*. The Experience of the Emperour *Charles* the Great; and *Lewis* the Godly would be noced to this purpose out of their *Capitulars*: *Novimus* (say they *multa Regna & Reges*

the

the *Lateran* Councel, it was lawful to every man to give his Tythes to what Church he would, which was so farre otherwise, as that before this violence offered unto the Church, there was a flat

eorum propterea cecidisse, quia Ecclesias spoliaverunt resque earum vastaverunt, abstulerunt, alienaverunt, vel diripuerunt Episcopis & Sacerdotibus, atque (quod magis est) Ecclesiis eorum abstulerunt & pugnantibus dederunt qua propter nec fortes in bello nec in fide stabiles fuerunt nec victores extiterunt sed terga, multi vulnerati, & plures interfecti, verterunt, regnaque, & regionem, &, (quod pejus est) regna cœlestia perdiderant, atque propriis hæreditatibus caruerunt & baculum carent. So they in the 7. Book of the *Capitul. c.* 104. *fol.* 214. *Edit. Paris.* 1603. Whereas the *Capitular* attributeth those grand enormities, and their ill successe to the Kings of that time, it is not now to be understood. Farre be it ever from us to think otherwise then divinely of those our most religious Princes, by whose gratious protection the Church hath been of late so miraculously blest. As for others among us, they may apply this to themselves as they shall be troubled with cause and occasion. The great Impostor in this *Alcoran*, though he cozened all the world besides, yet he would not defraud the Church. *De Decimis tuæ*, saith he, *& inde secundum morem consuetum operare, Infidis te subtrahe semper.* So our *Robert* of *Reading* translateth: But he that reads *Roberts* Translation, must not alwaies think he reads the *Alcoran*. The Prophets own text is in שורה זראתון אתי *Surato laaraph*, (which in our manuscript *Alcoran* is the 8. *c.* & the 17. in *Roberts* Translation) באלערף יעזרנן אראהלין that is give command concerning Tythes, and beware of Clownes; the word עזרף may be other wise understood; but if this were not *Mahumets* meaning, the matter is not great, for we have better Prophets to preach this doctrine.

The Rites of Baptisme in the primitive times were performed in Rivers where the persons to be baptized stood up & received that Sacrament; therefore it is that the Son of *Azalkefat* in the *Arabick* Gospels useth the word עמד *Amada* to baptize; which word also beareth the same sense in the *Syriack*, and is often mentioned by *Patriark Severus* in his שנתא דעמדא קדישא *Taxis* or order of baptizing the Saints: The reason in both Dialects is the same, for that the word *Amada* is by the *Syrians* & *Arabians*, derived from the Hebrew *Amad*, which signifieth to stand up. This manner of baptizing the ancient Church entertained from the example of our Saviour who baptized *John* in *Iordan*. And

Canon

some say that this was very tolerable in those Easterne parts, but Canon, (*Leo 4. 13. q. 1. c. Eccl.*) more Ancient then the fact of *Charles Martellus*, which did precisely forbid any man to pay, or the Bishop to give leave to any man to pay his Tythes from the baptismal

certain it is, that it was most convenient for that time, because their Converts were many, and men of yeares. A reason also may be, for that those ages were otherwise unprovided of Fonts and such conveniences which are now in use: and this hath been a cause, why this manner of baptizing was resumed in after-times, and other places, for our venerable *Bede* telleth us of some that were baptized here in *England* in the River *Swale*, which runneth through a part of *Yorkshire*, in the *North-riding*, and he giveth the same reason: *Nondum enim Oratoria vel Baptisteria in ipso exordio nascentes sibi Ecclesiæ poterant adhiberi Ecclesiast. hist. lib. 3. cap. 14.*

The daies we now live in have no other remainder of this Rite of Baptizing in Rivers and Fountains, then the very name; for hence it is, that we call our vessels that contain the water of Baptisme Fonts, or Fountains.

This custome of Baptizing in Rivers and Fountains being discontinued, Fonts were erected in private houses; but the violent persecutions of those times barred the Christians of that convenience, therefore their next recourse was to woods and devious places, and there they accommodated themselves with such Baptisterials as they could. In more peaceable ages they drew neares, and made bold to build their fonts a little distance from the Church; afterwards they obtained, that they might be set in the Church-porch: and at last got them into the Church. But they were not placed in every Church; for at the first they were only found in Cities where the Bishop himself resided, and onely in the great Church of such a City; and though Service might be said in the lesser Minsters and rural Churches, yet the right of Sepulture and Baptisme belonged to the Cathedral Church, unless it were in case of necessity: and it was therefore called the Mother-Church, because that as the people in their Mothers wombe were born Men, so in the Fonts of Baptisme, as in the Churches wombe, they were born Christians. In succeeding ages, when it was found that the Mother-Church was too farr distant from some Villages, and so situated, that in the Winter time the people could not repair thither, consideration was had of this inconvenience, and the Bishop took occasion from hence to transferre the right of Baptisme and Sepulture to Rural Churches, and this together with the right of Tythes, &c.

Church

Church to another: and that the contrary was yeeld-
ed to in the *Lateran* Councel, was not that they held
it lawful to enrich one Church in this ſort, with the
impoveriſhment of another, but the cauſe was the

made it a Parochial Church, of that kind which we now have.

But becauſe alſo in many Pariſhes ſome Families liv'd ſo remote from their Church, that they could not conveniently frequent it, it was indulged to thoſe, that they might build themſelves either in or neer their manſion-places a private Oratorie, reſerving for the moſt part, the right of Baptiſme and Sepulture to the Parith-Church, which, in reſpect of theſe leſſer Oratories, was to be accounted their Baptiſmal and Mother-Church. It was alſo provided that theſe Families, notwithſtanding their grant of a private Oratorie, ſhould on high daies repair to their chief Church, as it ſeemeth by the Councel held at *Agatha Can.* 31. *Tom.* 1. *Si quis extra parochias in quibus legitimus eſt, ordinariuſque conventus, oratorium in agro habere voluerit, reliquis feſtivitatibus ut ibi miſſas teneat:* (or as *Gratian* hath it the Decree, *Audiat*) *propter fatigationem familiæ juxta ordinem permittimus. Paſchate vero, Natali Domini, Epiphania, Aſcenſione Domini, Pentecoſte, & natali Iohannis Baptiſtæ, (& ſi qui maxime dies in feſtivitatibus habeantur) non niſi in Civitatibus aut Parochiis teneant.* (or as *Gratian* hath it) *audiant.* Thoſe private Oratories were afterwards called *Capellas* Ghappels, and thoſe that in them exercited the Miniſterial function were called *Capellani* Chaplaines. But for the reaſon of the name, ſee *Baronius* upon the *Roman Martyrologue*, at the 11. of *June.* Or if the Cardinal there ſatisfie not; ſee what *Cujacius* hath obſerved (out of *Heſychius*) *Ad 4. lib. Decretal., C. Capellanus. De Secundis Nuptiis.*

By that which hath been ſaid, it may appear in ſome ſort, what was a baptiſmal Church. And it is agreeable to that which *Limwood* hath noted upon the Provincial conſtitution: *Baptiſterium. in verb. Baptiſmal. Eccleſ.* A baptiſmal Church (ſaith he) is, *Sive Cathedralis, ſive Parochialis viz. quæ habet populum, nam in Eccleſia collegiata vel conventuali quæ non habet populum non debet eſſe Baptiſterium; Dicitur etiam Eccleſia Baptiſmalis reſpectu Capellarum ſubjectarum, quarum plebis infantes in eâ baptizantur, & non in ipſis Capellis immo ad ipſas Eccleſias baptiſmales tanquam matrices pro baptiſmo recurritur, &c.*

Concerning theſe baptiſmal Churches, the Canon ſaith that there can be

hardneſs

but *tua in eadem terminatione cum suis Capellis: cap. Plures 16. q. 1.* And hardneſs of mens hearts, who ſcarcely could be wonne by this favour to reſtore that little again unto the Church, that their forefathers had in ſuch abundance taken away from it: and that the Fathers of the ſaid Councel did yeeld thereunto (al-

the Tythes were of right to be paid to theſe Churches, it is evident by the Decree, where *Anaſtaſius* provideth, that no man under pain of Excommunication ſhould, *Tenere aut extra Eccleſiam Baptiſmalem dare decimus & oblationis Eccleſiæ, quas dare debet populus*, C. Statuimus eod. tit. And *Leo*, *Non tantum nobis ſed etiam Majoribus noſtris viſum eſt decimas juſto ordine plebibus tantum ubi Sacroſancta Baptiſmata dantur, debetur dari*, C. *De Decimis ibid.* Yet notwithſtanding all the care that could be taken the complaint was *Quidam Laici vel in propriis, vel in beneficiis ſuas habent Baſilicas, & contempta Epiſcopi diſpoſitione, non ad Eccleſias ubi Baptiſmum, & prædicationem, & manuum impoſitionem, & alia Chriſti Sacramenta accipiunt, decimas ſuas dant, ſed vel propriis baſilicis, vel aliis Eccleſiis pro libitu ſuo tribuunt. C. In Sacris ibid.* What diſtinction of Churches our Anceſtors had, and how neer it cometh to that which hath been ſaid, we may obſerve out of the Decree made at *Winchester* in the Reign of King *Cnute*; where it is provided, that all thoſe that any waies violate the peace of the Church, ſhould receive a proportionable penaltie. Therefore ſaith the Decree *num.* 3. Betmon ænerȝ þonne ȝnið-bpice intoþæn cýpican be ðam þe ȝeo ðæðe ryð. ⁊ be ðam ðe ðæne cýpican mæð ryð; Ne lynd ealle cýpican na ȝelicne mæþe punulðlice peopðe þeahhiȝ ȝodcund lice habban halȝunge ȝelice; þeah cýpicum ȝniþbpice ir æt bot pýnþum þinȝum be cýnȝer munde. ⁊ ir mið fif pundum on englalage, ⁊ medemnan mýnrtpef mið 120 rcll; ⁊ ⁊ ir be cýninger pite. ⁊ þonne ȝyt læſſan þæn lytel þeopðom ry. ⁊ legenrtop þe ry. mið 60 rcill; ⁊ pelðcypice þæn legenrtop ne rý mið þpittiȝum rcill: First, let the breaking of thy

though

though it were an inconvenience thus to do) was, that they did count, although they did admit that it might be for the preſent, yet there might be a better time found out after for the reformation thereof, and ſo ſuſtained the inconvenience for the preſent upon this reaſon, that the univerſal Church of Chriſt is one body, and

Church peace be according to the deed it ſelf, and according to the dignity of the Church.

All Churches have not a like dignity in worldly worth, though they have a holy conſecration alike. Ꝥnyþþnice or peace-breaking in the head Church, hath the ſame puniſhment, as that of breaking the King's peace, and that is five pounds by Engliſh Law. In an inferiour Miniſter it is an hundred and twenty ſhillings, and that alſo is the King's mulct. In leſſer field-Churches, where there is no burying-place, it is thirty ſhillings.

How Tythes were to be paid to theſe Churches, it may be underſtood by another Decree of the ſame Parliament, *num.* 11. Gif hpa ꝑonne ꝑegen ry ꝑe on hif boclande cyricean hæbbe ꝑe legenꝛtop on ry ꝿerelle ꝑonne ꝑriddan dæl hif agene teoꝑunge into hif cyricean; Gif hpa cyricean hæbbe ꝑe legenꝛtop on ne ry ðo he of ðam nigon dælum hif ꝑceotu ꝑ ꝑ he pille ⁊ ga ælc cyricꝛceat into ꝑa ealdan mynꝛtre be ælcan ꝓnigean heoꝑe (or eoꝛiꝑe, as it is in the Laws of *Edgar*, where this Decree is alſo ſet down, *num.* 3.) that is, If a Thane have a Church in his bocland, to which there belongeth a burying-place, let him give the third part of his own Tything to that Church: if he have a Church without a burying-place, let him give of the nine parts to his Prieſts that which he will, and let all Cyricſcear go to the elder Miniſter out of all free-hold.

For that which the Law calleth Bocland, ſee *Lambard* in the Explication of words, premiſed to his *Archaionomia*; where alſo he telleth what a Thane is.

every particular Church a part of that body; and so it less mattered to what particular Church they were restored, so that they were restored at all: for that by the restitution to one, they hoped in time they might with more likelihood come unto the other; for those things wherein there is an identity, or like representation of Nature and Condition, as is between Church and Church, have an easier passage the one from the other, than those that are of different nature and disposition, as a Lay-man and a Church.

CAP. III. SECT. III.

That out of that violent Prescription, many other Prescriptions arose, but of less moment.

Out of the Ruins of this violent and presumptuous Prescription, which hath now obtained strength of a Statute in the world, have issued sundry petty Prescriptions, which also are confirmed by Law and Custome, as the others were; as the Prescription wherein one Church prescribeth Tythes against another Church, the Law punishing therein the negligence of the one, and rewarding the vigilancy of the other: Prescriptions, whereby one Ecclesiastical Body Corporate or Politick, prescribeth Tythes, or other Ecclesiastical Duties, against the Parson or Vicar of the Parish, and the Parson and Vicar again against them: A Prescription whereby a Lay-man, having no right to prescribe Tythes, (because he can in no right possess

Regul. fine possessione de regulis juris in 6.

Tythes,

Tythes, and preſcription cannot proceed without poſſeſſion) doth notwithſtanding by pennancy, or giving ſome part of his ground or penſion in money in lieu thereof, preſcribe a diſcharge thereof; A Preſcription wherein a Lay-man doth preſcribe the manner of Tything, which albeit by the Common-Law is counted to be good by paying a thing never ſo ſmall in lieu thereof, yet neither by the Canon-Law, neither by the Law of God it ſelf, could it ever be leſs than the juſt Tenth it ſelf; ſo that the manner of Tything with them is not underſtood in that ſenſe, as the Common Lawyers do take it, by paying any thing whatſoever in place of the juſt Tenth, but their intendment hereby is, that no Country can be bound to an uniformity of payment of Tythes to be uſed every where: but every man is to pay Tythes according to the manner of the Country where he dwelleth; that is, that one paies his Tythe-Corn, and bindeth up the ſame in ſheaves, another leaves it ſcattered in the rowes, another Tythes it in Cocks or Pooks; and this is it that they mean, that there cannot be an uniformity of Tything preſcribed to every man, after which he is of neceſſity to ſet out his Tythe, but that he may preſcribe ſome other manner of Tything againſt the Parſon or Vicar: but againſt the uniformity, that the whole Tythe ſhould not be paid, was never any Preſcription allowed among them; for they evermore have been of this mind, contrary to that which the School-men hold, that Tythes are part of the Moral Law, and not of the Judicial or Ceremonial Law; and that in the

Lindwood. Provin. quoniam verbo uniformis in Gl. de decim.

Ead. verbo conſuetudines.

Cap. à nobis de decimis in Gloſ.

Precept of Tythes, there is a double conſideration; one of the honour of God, whereby he retained Tythes unto himſelf, in ſign of his univerſal Lordſhip over the World, which is irremiſſible; the other of the profit or utility of man, in that it concerneth the proviſion of the Miniſter in all ages, which is undiſpenſable.

CAP. III. SECT. IV.

That Eccleſiaſtical Judges admit Pleas in diſcharge of Tythes, and the manner of Tything, contrary to the conceit that is had of them.

And yet, notwithſtanding all this, the Eccleſiaſtical Judge admitteth all kindes of Preſcriptions before named, and according to the proofs thereon brought, giveth ſentence either of abſolution or condemnation: albeit the reverend Judges of the Land, upon an erroneous report made in the eighth year of *Edward* the Fourth, have a conceit to the contrary, *viz.* That no Eccleſiaſtical Judge will admit any plea in diſcharge of Tythe, or the manner of Tything, as it is in their ſenſe taken; and therefore they hold whatſoever the Defendant doth alledge in his Suit for a conſultation, and namely that the Eccleſiaſtical Judge did allow all the Plaintiffs plea and allegation, and did admit him to the proofs thereon without denial, are idle ſpeeches, and rather words of courſe than of effect and ſubſtance. And therefore notwithſtanding, whatſoever is alledged by the Defendant,

ſendant, as concerning the Eccleſiaſtical Judges well acceptance thereof, it is counted nothing material by the Temporal Judges, for that they have a prejudicate opinion of the Eccleſiaſtical Judge in theſe caſes: and therefore howſoever the refuſal be, or be not; they grant out their Prohibition in theſe caſes. And yet if the Judges Eccleſiaſtical proceedings might be ſeen, and vouchſafed to be read before them, it would be plain, there was no ſuch cauſe of their hard opinion againſt them; for every where they do allow ſuch and like allegations. And if perhaps one inferiour Judge ſhould make refuſal as they pretend, yet could it not be reformed by another in an ordinary courſe of appeal, but that there muſt needs be brought a Prohibition out of the Common Law to redreſs the ſame: unleſs happily they can ſhew, it is a general conſpiracy in the Eccleſiaſtical Judges, or a maxime in their Learning, that they will not, or cannot admit any plea of diſcharge in this caſe, which they can never do. And therefore they are to be intreated to change their opinion in this point, and not do the Eccleſiaſtical Judges that wrong, as to charge them with ſuch an imputation, whereof their whole practice is witneſs to the contrary: for it is unworthy ſuch mens gravity as theirs is, who propound unto themſelves the enquiry of truth in all matters, thus to be miſconceived and masked in an errour, and that for ſo many years, and not to be willing to hear the contrary, which is an obſtinacy in Policy no leſſe obdurate, than the Papiſts is in Religion, who ſee the truth, and will

not believe it. And so far as concerning Prescriptions, and the first cause and beginning thereof.

CHAP. IV.

SECT. I.

Of Priviledges, and how they came in: and that by reason of the frequence of Priviledges, Statutes of Mortmain came in.

NOw it followeth that I speak of Priviledges, which are Immunities granted unto private men beside the Law.

Of these, some are very ancient, such as true zeal toward the Church bred, and the just admiration of the holy men of God for their sanctimony of life, their great knowledge in the Word of God, their great patience in persecution for Christ and his Gospel, the vigilancy and care they had in their Office, stirred up both in Prince and People. *Constantine* the Great, being ravished with the love of Religion, and the good opinion he had of the Ministers of his time, erected Churches, and endowed them with large possessions, and granted them sundry immunities, whereby they might more securely intend to the preaching of the Word of God, and the winning of Souls to the Christian Congregation, wherein they laboured with all their might and power, God still adding to the number of the Elect. Neither did he this alone in his own person, but he also gave leave to all other of his Subjects

Subjects that would do the like: whereupon the Church was ſo enriched within a ſhort time, that as *Moſes* in the building of the Ark, was fain to make a Proclamation, that no man ſhould bring in more towards the building thereof, the people bringing in continually ſuch great abundance of all things neceſſary towards the furniſhing thereof, as that there was enough, and much to ſpare: So alſo *Theodoſius* the thirteenth Emperour after *Conſtantine* (although otherwiſe a moſt loving and favourable Prince toward the Church) was fain to make a Law of Amortiſation, or Mortmain, to moderate the peoples bounty towards the Church; as did alſo many wiſe Princes in other Nations upon like occaſion, in imitation of this Act of *Theodoſius* many yeares after; and among the reſt, divers Princes of this Land did the like, upon the dotage of the People towards the Religious Parſons, and eſpecially towards the four Orders of Friars that were then newly ſprung up in the World. But yet this Act of *Theodoſius* was done with the great diſlike of theſe bleſſed men *Jerome* and *Ambroſe*, who lived in thoſe daies: For that *Jerome* thus complaineth to *Nepotian* of that Law; *I am aſhamed to ſay it, the Prieſts of Idols, Stage-players, Coachmen, and Common Harlots, are made capable of Inheritance, and receive Legacies, only Miniſters of the Goſpel, and Monks, are barred by Law thus to do; and that not by Perſecutors, but by Chriſtian Princes: Neither do I complain of the Law, but I am ſorry we have deſerved to have ſuch a Law made againſt us.* In like manner, and upon the ſame occaſion,

L. 1. c. de ſacroſ. Eccleſiis 9. Si quis authent. de Eccleſia.

* *Magna Charta cap. 56. W. 2. C. 31. an. 13. Ed. 1.* Concerning this, ſee what *Perkins* ſaith in his book *De Amortizatione Bonorum, cap. 6.*

occasion, doth *Ambrose* deplore the state of the Clergy in his 31. Epistle: *We count it* (saith he) *no injury in that it is a loss, we are not grieved that all sorts of men are made capable of Wills, none excepted, how base, prophane, or lavish of his life or honesty soever he be, but I am sorry the Clergy-men only of all sorts of people, are barred the benefit of the Law that is common to all; who notwithstanding, only pray for all, and do the common celebration of the Service for all.* So far they.

* Notwithstanding the ill opinion which in these daies is not without

* And yet whosoever looketh into this constitution, whereby it was forbidden, that any man should passe any Lands or other unmovable possession unto the Church, without the Prince's leave (for that thereby the things that are so pas-

cause conceived against the ancient *Abbyes* and *Frieries*, yet it must not be believed, but that these Religious Houses, in the old and true intent, were purposed onely for piety, and for such a practise thereof which the Soul might freely enjoy, while it was set at liberty from the inquietude and avocations of the over-active World. Therefore some of the grave Sages, and learned Fathers of the Church, retired themselves to this divine and peaceful solitude, and the profitable and profound writings which yet remaine, sufficiently testifie how well the Monkes of old could spend their times. What strict devotion, and unblamable carriage the ancient Princes of this Land have expected from their Holy Men of this kinde, may be understood by the Law made in the daies of King *Cnute*, *Num.* 6. Ꝥ ꝑe ꝓillaþ Ꝥ ælcer haþer men ꝛeopne ꝛebuꝛan ælc to þam ꝓihꝛ þe him to ꝛebyꝓiꝛe; Ꝥ huꝑuþinga ꝛoþaꝛ þeopaꝛ biꝛcopaꝛ Ꝥ abbodaꝛ munecaꝛ Ꝥ mynecena canonicaꝛ Ꝥ nunnan to ꝓihꝛe ꝛebuꝛan Ꝥ ꝛeꝛollice ſibban; Ꝥ ðæꝛeꝛ Ꝥ nihꝛeꝛ oꝛ ꝛelome cliꝑianne to cꝓiſꝛ; Ꝥ ꝑon eal cꝓiſꝛten ꝑolc þingian ꝛeopne; Ꝥ ealle ꝛoðeꝛ þeopaꝛ ꝑe biddaþ Ꝥ læꝛaþ Ꝥ huꝑu

sod,

ſed, come, as it were, into a dead hand, which ſinga ſaholdeth ſurely faſt that which it once apprehendeth, ceſdaſ ſ neither eaſily parteth with it, ſo that it cannot hiz zod without much difficulty be reduced and brought hipan ȝ clænniſre luſtan ȝ beoȝgum heom ſylfum piþ zodeſ ipne ȝ piþ þone peallendan bnyne ðe pealleþ on helle; ful zeonne hi pitan ſ hiz nazon miþ nihte þuph hæmeð ſinze piſeſ zemanan; ȝ re þe ðæſ zeſpican pille ȝ clænneſſa healdan habbe he zodeſ miltre ȝ to punuld punþſcipe ſý he þegen ſage pýnſe: That is, And we will that every man of every Degree, do earneſtly follow that Right which to him belongeth, eſpecially God's Miniſters, the Biſhops, Abbots, Monks, Votaries, Canons, and Nuns, that they take a right courſe, and live according to Rule, that they call to Chriſt night and day, much and oft; and that they do it earneſtly for all Chriſtian folk. And we command and teach all God's Miniſters, eſpecially Prieſts, that they hearken to God, and love Chaſtity, that they may deliver themſelves from God's ire, and from the tormenting flames that burn in Hell. Full truly they wit, that it is againſt the Right to meddle with Women for luſts ſake. And thoſe that will abſtain from theſe things, and cleanneſs hold, they ſhall have God's mercy, and in worldly worſhip they ſhall have equal Right with a Noble-man.

It ſeemeth alſo by an *Arabick* Canon of the firſt *Nicene* Councel' what great ſtrictneſs and ſeverity of life was required of theſe holy Orders; for the Canon ſaith, That they might not carry about them—— مجمع الاسكاكين كما يعملون الذين يخرجون الى والقتال الحرب &c. ولا يجعلوا في اوساطهم كيسا &c. ايضا ولا &c. ولا يتختمون بخواتيم الذهب والفضة يسعون في الطرق والاسواق سعيا بغير وقار a pair of knives, as if they were quarrelling fellows, going to fight and kill, &c. That they might not hang a purſe at their girdle, &c. And moreover, that they might not walk in the Streets or Allies, but in a moſt grave and ſober manner, &c. as it is ſet down in القادرن الثمادون the 80.

again

Canon of the forenamed Arabick Councel, according to the Manuscript Copy.

again to the commerce and common use of men) shall find it was rather for the benefit of the Common-wealth, than for the dislike of the Church, that it was so ordered.

The great estimation that was had of these holy men, enforced such an immoderate charity in devout mindes, that they obtained most especial Priviledges and Exemptions, and no man thought any thing too good or too much to bestow upon a Monastery. But two great inconveniences followed upon the confluence of these large and ample endowments; one was the luxuriant demeanor of these Religious Orders, degenerating from their old sanctimony. This is noted and provided against by the Novel of *Nicephorus*, about the year 963. Ἀρτι δὲ βλέπων τὸν περὶ τὰ μοναστήρια, καὶ τὴν ἀπὸ τῶν σωμάτων περιουσίαν ὑπὸν (μέσον γὰρ ἐγὼ τοῦτο ἀφιλτάτων τοιούτῳ κτλῶ) ἐν ἴσῳ τινὰ δι' αὐτῶν κακῶν διαφθοράν ὑπιφαίνον, ἢ πῶς κωλύσω ἢ ἀμελῶ: πῶν γὰρ πανδόμενον ἐξ ἀπίστων. Ἢ τοῦτον λαβόντες τὸν ἀφορμὴν, πρὸς τοσοῦτον ἀσεβήματα, καὶ μανίας ἀδιξῆς (χρὴ γὰρ Θεοῦ φίλους ἀκούειν) ἐξέχυθησαν; γῆς πλέθρα μυρία, οἰκοπέδων μέρη, ἵππων ἀγέλας, βοῶν, προβάτων, ἄλλων κτηνῶν ἀναρίθμων πρόβατα, ὄνους ἄφετα κτῆσις ἀνυπόζυγος, καὶ πλὴν ἴσης μεμιγμένα τῆς ψυχῆς ἀεὶ αὐτὰ περιλαίνουσας, ὥστε μετ' ὀλίγον τῷ κοσμικῷ βίῳ, καὶ πολλῷ ὑπερμείνοντι. Ἢ φεύγειν, τὰ μοναχικὰ ταῦτα διαρρήδην: That is, Now perceiving among the Monasteries and Religious Houses a notable Disease, (for so I call their unsatiable desire) I find not which way I may provide a Cure for this Malady, or how to Punish this Excesse. For what Fathers could perswade them, or from whence could they take occasion so superfluously to abound, or (to say with holy *David*) to be so vainly mad? Their care is every hour to purchase to themselves Lands without number, sumptuous and stately Buildings, troops of Horse, droves of Oxen and Camels, and other Cattel innumerable; and bending all the sollicitude of their mindes this way, they make a Monastical life little different from that of the World, which is incumbred with variety of anxious care. For these and the like Reasons, the Novel forbids to build any more Monasteries. But this was afterwards repeal'd by the Junior *Basil*.

For

For if that courſe had been holden on ſtill, the greateſt part of the livelihood of the Commonwealth would in ſhort time have come unto the Church, and ſo Lay-men ſhould not have been able to have born the publick Burthens of the Another great inconvenience would have been, the impoveriſhing of ſecular States by Amortization of Lands, which Princes foreſeeing, ſet a bound to theſe exorbitant Donations, reſtraining the exceſs of that Charity by mature and timely decrees. In *Spain* the Laws of Mortmain began, under the Kings of *Aragon*; in *France*, *nihil uſitatius*, as one ſaith: The like proviſion hath been made here at home, for which ſee the Statute *De Religioſis* in the Great Charter, which alſo hath been confirmed by the ſucceeding Princes of this Land: Yet in what caſes Lands may be deviſed in Mortmain, ſee the Writ *Ad quod Damnum*, in the *Natura Brevium*.

Concerning the reaſon of the name, *Polydore Virgil*, ſpeaking of the Confirmation of the former Statute made by *Ed.* the firſt, ſaith thus, *Et Legem hanc ad Manum mortuam vocarunt, quod res ſemel data Collegiis Sacerdotum, non utique rurſus venderentur; velut mortua, hoc eſt, uſui aliorum mortalium in perpetuum adempta eſſent.* That which the Author ſaith concerning this, is the reaſon of *Perkins*, in his book *De Amortizatione bonorum*, cap. 2. That the notation of the word is otherwiſe obſerved out of the Statute by a great Lawyer: Lands (ſaith he) were ſaid to come to Dead Hands to the Lords, for that by Alienation in Mortmain, they loſt wholly their Eſcheats, and in effect their Knight-ſervice, for the defenſe of the Realm, Wards, Marriages, Reliefes, and the like; and therefore was called a **Dead Hand**, for that a dead hand yeildeth no ſervice. It is the obſervation of Sir *Edward Cooke*, upon Judge *Littleton's* Tenures, under the Title of Fee-ſimple, upon the words [*Car ſi homine purchaſe, &c.*]

Whatever uſe there might be of theſe Laws of Mortmain in time paſt, certain it is, the preſent needeth them not; for in theſe daies few men are ſo raſh-handed, as to give too much to the Church: And that which was heretofore ſaid of thoſe things that were given, that they were in a **Dead Hand**, may now more juſtly be ſaid of thoſe that are taken away.

Common-

Common-wealth; which it concerns ſecular Princes to be careful of, and to foreſee, that by overmuch bounty towards the Church, they impoveriſh not their own State, and loſe the right of Eſcheats, Primer-ſeiſin, and other Priviledges of the Crown in caſes of forfeiture, and eſpecially make bare their Lay-Subjects, upon whom a great ſervice of the Common-wealth doth lie. And yet otherwiſe the beneficialleſt ſtate of this Realm unto the Prince is the Clergy, as from whom the King hath a continual Revenue in Tenths, and is deepeſt in Subſidy, and not the leaſt in all other extraordinary charges, according to the proportion of their place. And therefore, as the King is to maintain the one, ſo he is alſo to cheriſh the other, and not to ſuffer their ſtate in any ſort to be diminiſhed, for that all other ſtates are made for the ſervice of the Church, and the Church again for the benefit of them.

But this was none of thoſe Priviledges that I ſpake of, for theſe are more ancient than they, and granted out upon better devotion than the other: but after this the zeal of Religion being almoſt extinguiſhed in the Chriſtian World, (partly by the great uproars and tumults that were in every Country, by the breaking in of one barbarous Nation or other upon them; who pulled down Churches faſter than ever they were built, and made havock both of Prieſt and People that profeſſed the name of Chriſt, partly by the Hereſies that roſe every where in the Church in thoſe daies, which diſtracted mens minds, and made them waver in the conſtancy

ſtancy of their Religion) it was received again upon this occaſion.

CHAP. IV. SECT. II.

Of the beginning of Cloyſtered Monks in the Weſt Church of Chriſtendom, and that the Author thereof was one Benedict. *a Roman, about the year 606.*

ONe *Benedict*, who otherwiſe had been a man of action in the Common-wealth, (that *Benedict* which was as it were the Father of all thoſe that profeſſed a Regular life within the Weſt part of Chriſtendom; for before his time the Monks of the Weſt Church ſerved God freely abroad, without being ſhut up in a Cloyſter) he, I ſay, finding himſelf wearied with the tumults and broyles which happened under the Government of *Juſtinian*, and ſome years after by the incurſion of thoſe barbarous Nations (before named) into *Italy*, retired himſelf into a deſart and ſolitary place, intending there to give himſelf wholly to the ſervice of God: where, when he had a while remained, he grew ſo famous by his Chriſtian exerciſes of faſting and prayer, and the good and wholeſome exhortations that he made to thoſe who reſorted unto him, that within a very little time after, there was great confluence of people came unto him, not only from divers parts of *Italy*, but even from ſundry other parts of the World; ſo that within a ſhort time they grew into a Fraternity under-

Hoſpinian de origine Monachatûs.

underneath him, to whom he gave rules to live by, to the imitation of that, which Saint *Basil* did in the East Church: to which his Disciples submitted themselves with all alacrity, leading a life far different from the common sort of men, denying unto themselves all those ordinary delights that other men do commonly take out of meat, drink, apparel, marriage, temporal preferment, and such other things which worldly and carnal men seek for very greedily, humbling themselves only to God, and the rule of their Master. Which thing bred such an admiration of him, and of his Schollers, that not only many other Orders sprang out from them within few years, as the *Premonstratenses*, *Cluniacenses*, *Templarians*, *Hospitallers*, *Cystertians*, and the Order of St. *John* of *Jerusalem*, but even Popes, Princes, and People, were wholly carried away with the wonderment of them, insomuch as every of them did as it were strive, who might shew themselves most kind unto them; whereupon Princes built them Houses, every one in his Kingdom, as *Clito Ethelbald* King of *Mercia*, built the Monastery of *Crowland* here in *England*, of Black Monks, under the rule of the said *Benedict*, in the year 716. Popes and Princes granted them priviledges, so far as it concerned either of their particulars; the Clergy, Nobility, and People, conferred Goods and Lands upon them, every one according to his ability.

CAP.

CAP. IV. SECT. III.

That the admiration which theſe Religious Men did breed of themſelves in the head of Princes and Popes, did procure appropriations of Parſonages, and Immunities from Tythes: And that over-conceit which men had of Prayer above Preaching in the Church, was an adjuvant cauſe thereunto.

IN this zealous bounty of every degree towards theſe new ſorts of men, there are two undigeſted Priviledges granted them, both of them ſo hurtful and injurious to the Church of God, as never any was the like. The one was, the Annexation or Appropriation of preſentative Benefices to thoſe Religious Houſes: The other, the freeing of ſuch Lands or Hereditaments as they held in ſundry Pariſhes, from the payment of Tythes to the Parſons and Vicars thereof; to both of which the School-mens Divinity gave great advantage, as ſhall be ſhewed hereafter.

Either of theſe had their beginning of one root; that is to ſay, of this falſe ground, that Preaching, which is the moſt true, and moſt natural food of the Soul, in a Congregation that is come to the profeſſion of Religion already, and knoweth but onely the Articles of the Chriſtian Faith, the Lord's Prayer, the Ten Commandments, and other Principles and Rudiments of Chriſtian Religion, is nothing ſo neceſſary for the ſalvation of a mans Soul, as Prayer is: Beſides, that Preaching

Linwood provin. eiſdem, de offic. Archidiaconi, & cap. Ignorantia Sacerdotum, de officio Archipreſbyteri.

ing oftentimes giveth more cauſe of Schiſm, and diſpute in Religion, then it doth of profiting and edifying the Soul: and therefore it was not permitted by the Provincial Conſtitutions of this Realme, that Parſons, or Vicars of Churches, ſhould expound or preach any other matter or Doctrine, then the Lord's Prayer, the Ten Commandments, the two Precepts of the Goſpel, that is, the Love of God, and the Love of a mans Neighbour, the ſix Works of Mercy, the ſeven principal Virtues, the ſeven Sacraments, (for ſo many then the Romiſh Church held) the ſeven deadly Sins, with their progeny; and and this to be done vulgarly and plainly, *Abſque cujuſlibet ſubtilitatis textura fantaſtica*, (for ſo they call learned and orderly preaching:) whereas notwithſtanding Prayer is evermore profitable, every where neceſſary, and never dangerous: Furthermore, Preaching onely profiteth thoſe that be preſent, and do hear it, and attend upon it; but Prayer is available even to thoſe that be far diſtant, yea though they be in the remoteſt place of the World. By which, and other like arguments, they tranſlated away that maintenance that was provided for the home-Paſtors, (who by God's own inſtitution, were to watch over their Souls) to foreign and ſtrange Guides, who never communicated to their neceſſity in any heavenly comfort, but onely took the milk of the Flock and fed themſelves withal. But by this pretence of theirs, ought not Preaching to have been diſgraced; for albeit Prayer be a neceſſary piece of God's

God's ſervice, and ſo neceſſary, that the Soul of man is as it were dead without it, yet is it not * equal to the Dignity of Preaching, which God hath ordained to be the only means to come to Salvation by: For Faith cometh by hearing, and hearing by the word of God; and without Faith it is impoſſible to be ſaved: for Faith is a gift that purifieth the heart, and maketh a mans prayers acceptable to God; and therefore neither of them ought ſo to take place, as that the one ſhould ſhoulder out the other, but they ought ſo to go hand in hand together, as that one ſhould help, aſſiſt, and countenance the other.

* But here it will need, that the Reader uſe a ſober judgement; for it cannot but be thought unequal, that Prayer and Preaching ſhould be ſo unwarily plac'd in competition, as that Prayer ſhould loſe by the compariſon. There may be alwaies need of Preaching, but then moſt of all, when the Auditory is unchriſtian. This reaſon prevailed for all places in the firſt times, but in theſe laſt onely for ſome; according to which, it were unprofitable to go about to Convert the *Indies* no otherwiſe than by our Prayers. Yet even in thoſe Primitive times, which had moſt cauſe to call for Preaching, we ſhall finde that this duty was of rarer exerciſe, and leſs ſolemnity than that of Prayer, as it may abundantly be diſcovered out of the Liturgies of both the Churches. And it is obſervable, that where Preaching hath been of the greateſt account, it hath been ſo much beholden to Prayer, that it was not onely begun and ended, but alſo diſcontinued by devotion: For we ſhall finde the Reverend Fathers, *Chryſoſtome* and *Baſil of Seleucia*, at Prayers in the middle of a Sermon: See the one in his 39. *Orat.* the other in his 3. *Homil.* Περὶ Ἀγραπλάνητ, &c. *Moſes* the Son of *Maimon*, that profound Doctour of the *Jews*, aſſuming a Compariſon betwixt their Sacrifices and the more ſubſtantial Services required, in ſtead of all others, nameth that of Prayer and Invocation, and of theſe he ſaith, that they are——&c. הראשונה יותר קרובות אל הכוונה nearer to (God's) firſt intention, and that our way thereunto, is by them: and afterwards he ſaith, that theſe are neceſſary——&c. בכל מקרים וכלמי שיורצה as all

times, in all places, and for every man. See his *More Nevoch*, Heleč. 3. c. 32. p. 137. And holy *Antioch* in his 106. *Homil.* which is of the ἐυχῆς, faith of Prayer, (ὅτι) ὑψηλοτέρα πάσης ἀρετῆς ἐστὶν ἡ εὐχή, that it is of a more sublime condition than any other virtue. And how our Lord himself stood affected to this, we may acknowledge by that, where he calleth the Church, his *House of Prayer*, not *Preaching*; which took so well in the elder times, that all their Temples were known by the name of Εὐκτήρια, Oratories. Nay, the Preacher himself, *Prov.* 15. is so confident of a Just mans Prayer, that he dares say, that God will even be obedient to it (for so ἀκούει, or ὑπακούει, is rendred by the Interpreter of the fore-named *Antiochus*.) However it may seem to be so, for when all the Preaching of *Lot* could prevail no otherwise, than to bring vexation to his righteous Soul, the Prayers of *Abraham* might have saved *Sodom*, if among so many thousands there had been but ten just men.

All this while we would not detract any thing from Preaching, but considering our selves to live under a State so maturely composed, and so throughly advised and setled in the Faith, it will be expected, that we should so far moderate our opinion of Preaching, as that our magnifying thereof may no way tend to the discredit or disadvantage of most necessary Prayer.

CAP. IV. SECT. IV.

Whether Appropriations came first from Princes or Popes it is questionable.

BUt how these annexations of Benefices first came into the Church, whether by the Princes authority, or the Popes licence, it is very disputable, and there are reasons on both sides for to shew the same.

For whereas there are reported by *Ingulphus* Abbot of *Crowland* before mentioned, to have been eight

eight Churches, beſide the Patronage of ſome other annexed and appropriated to the ſaid Abbey, by ſundry *Saxon* Kings, it doth not appear, by ought I can find, whether they were done by the ſoveraign Authority of the Kings alone, to the imitation of that that was done by *Martellus*, who made all Chriſtian Kings to ſin in this point, or that it was done by any other Eccleſiaſtical Authority, for that there is nothing extant for the allowance thereof, ſave the ſeveral Charters of thoſe ancient Kings only: and that I ſhould be the rather induced to believe, that it was done by thoſe Kings Authority only, I am thereto perſwaded, for that I find *William* the Conqueror, immediately upon the great Victory that he got over this Kingdom, to have appropriated three Pariſh-Churches to the Abbey of *Battaile*, which he built in memory of his Conqueſt. And whereas *William* his Son had depopulated and overthrown ſundry Churches in the New Forreſt, *Henry* his Brother by his Letters Patents gave the Tythe thereof to the Cathedral Church of *Sarum*, and annexed thereto twenty other Churches in one day, if the Copy of that Record that I have ſeen, as concerning theſe Appropriations, be true. Yea, the matter was gone ſo far in thoſe daies, that even Noble perſons, and other meaner men would command Corodies and Penſions to their Chaplains, and other Servants, out of Churches; and this could not be redreſſed until ſuch time as there was made a Statute to reform it. Anno 1. Edw. 3. c. 10.

On the contrary ſide, that I ſhould take it to be a

deviſe of the Pope, I am moved thereto, for that I find every of theſe Orders of Religious men were confirmed by one Pope or other; and as they confirmed them, ſo it is like they made proviſion for them, and that moſt eſpecially this way, and that chiefly after the Laws of Amortiſation were deviſed and put in ure by Princes: and thereupon it is that we find ſundry ſorts of annexations made by Popes and Biſhops under them, every one in their Dioceſs: as ſome were made ſo far as concerned the Patronage only, and then had the Monks therein preſentation only; ſome other were made *plene*, and then might the Monks both inſtitute and deſtitute therein without the Biſhop, and turn all the profit thereof to their own uſe, reſerving only a portion to him that ſhould ſerve the Cure there: ſome other Churches did they grant ſimply to them without any addition of full right, or otherwiſe: and then if the Church were of their own foundation, they might chuſe, the Incumbent being once dead, whether they would put any other there, unleſs perhaps the ſame Church had people belonging unto it, for then muſt they of neceſſity find and maintain a Curate there; and of this ſort were their Granges, and Priories, and thoſe which at this day we call Donatives: but if it were of another man's foundation, then was it otherwiſe. To this alſo I add, that the Pope every where in his Decrees,

Lindwood l. 3. licet bonæ memoriæ. Gloſſ. in verb. aſſerunt non ligari. de locato & conducto.

* By occaſion of that which the Author here ſaith, and that which he hath hereafter ſaid concerning the Patrons penſion from the Biſhop, *Chap. 5. Sect. 1.* of this third *Part*, it muſt be here enquired, what Right and Title the Dioceſan had to a new Church or Monaſtery, and how it ſtood in compariſon of the Patron; and becauſe

arrogateth this right unto himself, as a prerogative of the Apostolick See, to grant these priviledges to Religious Orders, to take and receive Benefices at Lay-mens hands, by the mediation of the Dio-

this Right seemeth originally to discover it self in the Found-

ing, Erecting, and Endowment of a Church, or Monasteries, (by all or either of which the Law saith, a Patron may be made, the Bishops consent always presupposed, as hereafter shall appear) therefore in the first place it must be considered, how far forth the Bishop was concerned in these, that it may the better be understood, how truly he was qualified to the Right of Presentation. For that which concerns Foundation and Erection. All that the Patron had free to himself in the first place, was but his Thought, he might think where he would design the Ground, or How he might build the Church; and if he entertained his own Motion, he might make it his purpose. But this was nothing without Execution; and to this the Diocesan was to be required, as the most principal and most effectual Agent: therefore is it said in the Fourth Canon of the Councel of *Chalcedon*, that no man shall erect μοναστήριον ἢ εὐκτήριον οἶκον παρὰ γνώμην τοῦ τόπου ἐπισκόπου, a Monastery of a Church without the Bishops consent. And *Lamberline* saith, that this was so necessary, that if a Church were set up in the Patrons ground without his consent, the Patron could not pull it down without the Bishops consent; yet if the Patron built a Church upon his own ground without the Bishops consent, the Bishop might pull it down without the Patrons consent, and yet in this case the Patron might not do it without the Bishops consent, &c. But to see further: For the Greek Church, their Euchologue saith, τὸν ἀμνὸν ἐνσφραγισάμενον τῷ μίλτῳ ἐκτίσεως τοῦ ναοῦ ὁ Ἀρχιερεὺς, &c. That the Materials being provided for the Foundation of the Church that shall be erected, the bishop cometh thither in person, &c. and having put on his Formalities, the ἐπιτραχήλιον and the ὠμοφόριον, he saith certain Prayers Εὐλογητὸς ὁ Θεὸς, &c. Παναγία μεσίτα, &c. This done Ὁ μὲν Ἀρχιερεὺς θυμιᾷ τὸν ἁγιασμὸν κύκλῳ· οἱ δὲ ψάλται λέγουσι τὸ Ἀπολυτίκιον τοῦ Ἁγίου· εἶτα ὁ θυμιᾷ ὁ Ναὸς μίλτῳ ἀφιερώσας, καὶ ἕτερα προσευχὴν ὅτε βούλεται ὁ ἀρχιερεύς, &c. i. the bishop censeth the Ground-work with his incense circular-wise, then the Singing-men say the Ἀπολυτίκιον [a kind of Collect] for the Saint to whose name the

Church is dedicated, and some other Services as the Chaunter shall appoint.

cesan, whose office it was to be a mean between the Religious house and the Incumbent, for an indifferent rate, that neither of them should press too much the one upon the other: and therefore in the

That which followeth in the Euchologue concerning the Consecration, which the bishop crosseth, and layeth for the Foundation, hath been formerly observed, by occasion of the Emperors Novel to this purpose.

Where we speak of the bishops habit, we have safely retained the words of the Euchologue, Ἐπωμίδιον and Ὠμοφόριον, for that we finde them unfaithfully and uncertainly rendred. The latter may import *Humerale*, the former seemeth literally to be as much as *collare*; but *Gretser* was very angry with *Suarez* for translating it so, (in his Notes upon a fragment of Cedrenus) *Quasi de Canibus sermo esset*, as if (saith the Jesuite) Mr. *Suarez* had been talking of Dogs: but see what *Gretser* himself saith to the words Ἐπωμίδιον and Ὠμοφόριον, in his Comment upon *Codin. cap.* 16.

To return to our Dioecesan. The Right and Title to a Church, and that which belongeth thereunto, is more particularly acknowledged by the ceremony, or setting up of the Cross, the performance whereof was in this manner: Ἀρχιερέως τοῦ Παλατίου ἐπὶ τὴν οἰκοδομὴν τοῦ Ναοῦ, ἢ γενέσθαι ἐπιτρέψαντος αὐτῷ τοῦ βασιλέως ἢ τινος ἀπὸ τῆς Ἐξάρχου αὐτοῦ, ἢ πρὸς τὸν τῆς Ἀρχιερωσύνης ἢ τῆς Διοικήσεως τοῦ Ναοῦ παλαιὸν ἐπὶ τὸν νεὼν ἀναβαίνοντος ἢ τὸν Σταυρὸν πολυτελῶς, καλὸν ἢ ξυλίνου ἢ σταυρὸν ξυλινὸν ἐν ᾧ γράμματα χρυσᾶ ἐγκεκολαμμένα ἐν τῷ ἑνὶ μέρει. Σταυροπηγίου παλαιοῦ ἐν τῷ ἑνὶ μέρει τοῦ Ἁγίου τοῦδε, ἐν τῇ Διοικήσει τοῦδε τοῦ Ναοῦ τοῦδε, ἐν τῷ δεξιῷ διαλείμματι παρὰ τὴν ἀνατολήν, ἢ ἐν τῷ ἀριστερῷ τοῦδε. Ἐν τῷ ἑτέρῳ μέρει. Ἐπὶ τὸ Βασιλικὸν ἐνσεβάσμιον ἔγκαινιον ἡμῶν τοῦδε, ἢ μᾶλλον τοῦδε, ἢ ἐν ἔτει τοῦδε. Καὶ πληρωθέντος ὁ σταυρὸς ἐν ᾧ ὁ τοῦδε μέλλει οἰκοδομεῖσθαι. Εἶτα ἐκφωνήσεως παρὰ τοῦ ἀρχιερέως ἐπὶ τῷ ἁγιασμῷ, ὅπως ὁ τοῦδε οἰκοδομήσῃ τὸν ναὸν ἢ τὸν σταυρὸν ἔπειτα ὁ ἄρχων τοῦδε ἐπὶ τὸν ἀναφορεῖς οἰκοδομήσει. Λάκκον ἔχει ὁ

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beginning, the usual rate that they set down between the Beneficed man and the Religious person, was the one half of the Benefice; for that it was not thought that the Pope would charge a Church

ἐν τῇ μεγάλῃ Ἐκκλησίᾳ, &c. *Euchol. græc.*; *i.* Word being brought to the Patriarch concerning the Church that is to be built, Letters are directed either to the Exarch, or to some of the bishops, to request that the Church may be founded, consecrated, and entituled to the Patriarchs Σταυροπήγιον: then commandment is given that a Cross of Wood be provided, upon which the Patriarchs Secretaries must set down, upon the one side, *The Patriarchs Σταυροπήγιον, consecrated in the name of such a Saint, in such a City preserved by God, in such a Province, of proper will, by such and such the most holy and Oecumenical Patriarch.* On the other side, *During the Reign of such and such our most religious Princes, in such a moneth, of such a year.* Then the Crucifix must be sent to the place where the Church is to be erected, and there [the bishop] by whom it is consecrated, saith the forenamed Service which is used at the founding of a Church; and when he maketh the Consecration, the Cross must be set up behind the holy Altar, there being prepared for it some lofty structure, fitted with a concavity (to receive it) either of Stone, Iron, or Brass, as it may be seen in the great Church. By the great Church, understand that of St. *Sophia* in *Constantinople*. Thus the Euchologie, for the Greek Church. The like to this (for as much as concerneth the substance) is observed in the Latine, but the Ceremonies there are more tedious and elaborate. The Reader that hath so much time and patience, shall find this use in their Pontifical.

By the setting up of the Σταυροπήγιον, the right of the new Church was conveyed to the *Patriarch*, or *Bishop*, as by an especial title; so that now, for the most part, things were altogether disposed by, but nothing at all without the *Bishops* jurisdiction. And we alwaies add, The *Bishop*, for though the Patriarch be especially named in the Euchologue, and it be also a controversie between them concerning this Title, as it is taught by *Balsamon* upon the 31. of the Apostles Canons, yet that the *Bishop*, if not only, yet also had this Right, it is evident by the Emperors Novel. And concerning the conveyance of this Right by the Σταυροπήγιον, see what is set down by the Patriarch of *Constantinople*, in the case of *John* bishop of *Lepanto*; and for this see the

Jus Græco-Romanum. tom. 1. lib. 3. Sect. Synod. n. p. 232, &c. above that rate. But after by the covetousness of Monks and Friars themselves, and the remissness of Bishops who had the managing of this business under the Apostolick See, the Incumbents par

Edit. Francofurt. Anno 1596. See also that of *Manuel, de jur. Patronat.* p. 242. And that the Patriarch, or Bishop, should challenge this jurisdiction over the new Church, it seemeth most reasonable. For what did the Lay-Patron do more than a man of Israel, who brought a Lamb to the door of the Tabernacle, but the Priest made it an Offering and an Atonement? The Patron indeed perhaps might chuse the place, but till the Prelate came and sanctified the ground, it might as well be *a Den of Thieves*, as *a House of Prayer*. The Patron might bring the Stones, the Bishop laid the foundation; or if the Work-man put the Materials together, and made up a House, the Bishop made that a Church: till then nothing was but the breathless body of a Temple, the Soul being yet to come from a diviner influence of the Diocesan. Therefore it was, that the priviledge of a new Church followed not the building, but the consecration of it; as the condition is worthily observed by the devout and learned King *Alured* in his Laws, *C.* 5. which is, Be cyricena ƿyrðe Of the priviledges of Churches. The King saith, that if a man pursued by his enemy flie to the Temple, ƿ hine ȝeoȝan nihtum nân man ut ne teo. No man may take him away for the space of a seven Night. ȝif he ȝon hungre libban mæȝe, &c. If he be able to live for hunger, &c. Other and great immunities the King there granteth to the Church: but the Law had this caution, ðe ȝette ærhyrȝe cyrican ðe Biscop ȝehalȝode ðiȝ ƿyrþ; This freedom we give to every (such) Church as shall be hallowed by the Bishop.

We have seen upon what just and valuable considerations the Diocesan might challenge a Right and Title to the New Church by Foundation and Erection: In the pursuit hereof we hope to set down manifest encouragements to argue the use and exercise thereof, in the endowment and filling of a Church or Monastery. Therefore if we look backwards, we shall find it a Custome

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came to so small a portion, that *Urban* the fifth, well nigh by *Othobon* his Legate here in *England*, in the year of Salvation 1262. was faign to make a Legantine, whereby he forbad all all Bishops of this Land to from all Antiquity, that the Goods and Revenues

of Churches have been alwaies acknowledged to belong of Right to the Bishops disposing. Some Authority for this may be had out of those Canons which are called the Apostles; Canon 37. Πάντων τῶν ἐκκλησιαστικῶν πραγμάτων ὁ Ἐπίσκοπος ἐχέτω τὴν φροντίδα καὶ διοικείτω αὐτὰ ὡς Θεοῦ ἐφορῶντος. Let the Bishop have in his power all the Goods of the Church, and let him dispose of them as in the sight of God. So the 40 Canon Πρεσβύτερος, &c. Where also the reason is given εἰ γὰρ τὰς τιμίας τῶν ἀνθρώπων ψυχὰς αὐτῷ παρθένται, πολλῷ ἂν μᾶλλον, ὅτι τῶν χρημάτων ἐπιτρέπεται. For if the precious Souls of men are committed to his care, how much more ought he to be intrusted with the Church Revenues. For the Authority of those Canons, it may now be thought too late, and to little purpose to speak: and yet I have alwaies marvelled who that should be, that durst be so bold, as to fasten so many forged precepts upon the Apostles; and much more, that whosoever he were, he could be so fortunate in his fraud, as not to be discovered rather in the next Age, than in those later times, which saw the former at a distance, and may be thought to know but a little of that which was then done. True it is, that some of these Canons may seem to smell neither the spirit nor style of that Age, in which they pretend to have been brought forth; and yet of others we are bound to think more soberly. To say no more, we will only set down that of the Arabick Paraphrast, who at the end of his translation of these Canons, in stead of that which the Greek saith [ταῦτα ὑμῖν ἀπὸ παρ' ἡμῶν, ὦ Ἐπίσκοποι, these things we have delivered unto you concerning the Canons, O ye Bishops] saith thus يا معشر المؤمنين اقبلوا كلامنا ووصايانا فانه من روح القدس الرب المحيي الهيئنا that is, O ye Family of the Faithful, attend unto our words and precepts, for that they come from the Holy Spirit of the Living Lord our Care. But however it be resolved against these Canons, yet that which we have said, is also set down by the Synod at *Antioch*, *Can.* 24, and 25. where note, (saith *Balsamon* upon the twenty

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(6th Canon) appropriate any more Churches to any Monaſtery, or other Religious Houſes, but in caſes onely where the perſons or places to whom they were appropriated were ſo poor, as that otherwiſe they

τὰ τῆς ἐκκλησίας διοικεῖν, that the Adminiſtration of thoſe things which appertain to the Church, belongeth to Eccleſiaſtical men. Read alſo to the ſame purpoſe the ſeventh and eighth Canons of the Councel held at Gangra. Εἴ τις παροικίαν ἐκκλησιαστικὴν, &c. And Εἴ τις δόσιν ἢ παραδοσιν προσφορῶν, &c. where a curſe is paſt upon all thoſe that preſume to give or receive the Church-fruits, otherwiſe than by the *Biſhops* diſpenſation, or theirs who by the *Biſhop* ſhall be appointed thereunto. And *Steven* Biſhop of *Rome* in the ſecond Century, ſaith, *Laicis quoque quamvis religioſis [illegible] nullis tamen de Eccleſiaſticis Facultatibus diſponendi*, (ſo we read, rather than *Reſpondendi*) *legitur unquam tributa facultas*, that it cannot appear, that ever any power was granted to Lay men, though Religious, to diſpoſe of Eccleſiaſtical goods. It is the *Biſhop's* obſervation in his ſecond Epiſtle, and long after him it was repeated in the Councel at *Lateran*, under *Innocent* the Third, *Chap.* 44. In the year 589. it was ſet down in the *Toletan* Councel, Can. 9. that Churches *cum ſuis Rebus* ſhould *ad Epiſcopos pertinere*. *Cyril* of *Alexandria* in his Epiſtle to *Domnus*, ſaith, that the Dioceſan for the time being, may θαρρεῖν, that is, (ſaith *Balſamon*) ἀντὶ τοῦ [illegible] ἀσφαλῶς, that he may confidently and ſecurely be intruſted with the Church Revenues. And becauſe the *Biſhop* had this power over the Goods which were conſecrated upon the Church, it ſeemeth to be a Reaſon why he was ſometimes preſent at the laſt Will and Teſtament of Benefactors in this kind; for thus appeareth by the Will which *Bertricke* made, a Saxon Gentleman of *Mepham*, related by *Lambert* out of the Antiquities of that place. And þa tyn hyda on ſtreettune into ðam myncſtre to polcneſtede; And þ land æt healcanham æfter byſhpaſa ðæge into S. Andreæ for ſaulſcrifte ſaple, ælfhlafonde and hiſ yldran, ſpa heora cpide pær: And I give (ſaith the Teſtator) ten Hides at *Streiton* to the Miniſter at *Walkonſtede*, and the Land at *Falcham* after *Bythwares* daies

were

were not able to ſuſtain themſelves; or that the cauſe were ſo juſt, that it might be taken rather to be a work of Charity, than any inforcement againſt Law: and that beſide with this pro- *Ælfricks* Soul, theis Lord and his Elders, ſo their Will was, &c. And this is ſaid to be done on ȝeþuhtneſſe Eadgife þæſre hlæfdian 7 Odan Æſcebiſceopes, &c. and Ælfriet Preoſtes on Croȝdene; i. Witneſs *Eadgive* the Lady, and *Oda* the Archbiſhop, &c. and *Ælfſie* the Prieſt of *Croydem*.

From this Right which the Dioceſan had in the diſpenſation of Eccleſiaſtical goods, it proceedeth that he was alſo eſpecially concerned in the Endowment of a Church or Monaſtery. For a Monaſtery, the ſeventeenth Canon of the ſeventh Synod ſaith thus, "Ὁ βελόμενος κτίσαι μοναστήριον ἢ μὴ πρὸς ἀναστροφὴν ἔχει κανόνα παρὰ τοῦ Ἐπισκόπου. *Inſ. Græc. Balſ. in Epiſt. S. Can.* τιμᾶ. ἀπὸ μοναχ. &c. But ſee for the Canon as *Balſamon* and *Zonaras* have it, and what they ſay, be it a Monaſtery, or otherwiſe a Church, or Oratory, *Balſamon* ſaith, ἀναστροφὴν ἀκλήρων μόνων περιγράφειν καὶ δοκιμασίαν τοῦ Ἐπισκόπου, τὸ δοῦναι. The Founder ſhall be forced to bring a competency according as the Dioceſan ſhall approve. And how much the *Biſhop* was conſidered in this matter, it appeareth by the thirty ſecond Canon of the fourth Councel at *Toledo*, held under *Honorius* in the year 633. *Noverint tamen conditores Baſilicarum in rebus quas iiſdem Eccleſiis confecerint, nullam ſe poteſtatem habere, ſed juxta Canonum inſtituta ſicut Eccleſiam ita & dotem ejus ad ordinationem Epiſcopi pertinere.* Where it is ſaid, that the Founder muſt know that he ſhall have nothing to do neither with the Church, nor that which he beſtoweth upon it, but both ſhall belong to the *Biſhop's* diſpenſation. And this is alſo cited by *Gratian* in the Decree 10. *q.* 1. *cap. Noverint.*

In the *Bracarean* Councel, held in the year 672. *Can.* 5. it is ſet down, that the *Biſhop* may refuſe to conſecrate any Church till he be made ſure of a convenible Dotation. *Meminerit* (ſaith the Canon to the *Biſhop*) *ut non prius dedicet Eccleſiam niſi prius dotem Baſilicæ & obſequium ipſius per de-*

viſo;

nationes Chartula confirmationem accipiat, nam nullus est ausus temeritas, &c. And before this, as much was said in the third *Toletan* Councel of the year 582. Canon 19. which also was reported in 888. in a Councel holden at *Mentz*, C. 4. *Multi contra Canonum constituta, sic Ecclesias quas ædificaverunt postulant consecrari, ut dotem quam eidem Ecclesiæ contulerunt consentant ad Episcopi ordinationem non pertinere. Quod factum & in præteritum displicet, & in futurum prohibetur: sed & omnia secundum constitutionem antiquam ad Episcopi ordinationem & potestatem pertineant.* And in the Councel at *Cabilon*, of the year 658. Canon 14. whereas the complaint was, *Quod Oratoria per villas jam longo tempore constructa, & facultates ibidem collatas ipsi quorum villæ sunt Episcopis contendant*: The satisfaction was, *Hoc convenit emendari ita ut duntaxat in potestate sint Episcopi.* Also the Canon *Nullus Abbas, &c.* of the Councel at *Worcester*, related before in the matter of Parishes, is much to this purpose. Where we cite it out of a *MS. Biblioth. Bod.* which is a Continuation of *Marianus Scotus*. We find it also in the Continuation to *Florent. Wigorn.* by one called Thetford, looking better into our Manuscript *Marian*, we find that it agreeth, for the most part, with this *Florence* of *Worcester*. But further to argue this dispensative Power in the Diocesan, he that is willing to observe, may find several passages both of late and elder times, among the Records of *Lincoln*, a sight whereof I had by the great favour of my worthy Friend, Mr. *Edward Townshugh*, one of the Canons Resident of that Church.

We have seen how far the Diocesan was concern'd in the Erection and Endowment of a Church, or Monastery, it remaineth that we now consider him in that which appertaineth to the Filling. For a Monastery, certain it is that none could be admitted but by the *Bishop's* authority. This was determined in several Synods, we note only the forenamed Councel held at *Nice*, because there also the reason of this is set down; let the Reader see the fourteenth Canon in the Latine Translation, set forth by *Turrian*: As the Bishop was to be look'd after by those that would come into a Religious House, so also by those that would go out. So it seemeth by the Law of *Alfred*: Gif hwa Nunnan of myntre ût alæde butan cyninges

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thereout, according to the quantity thereof: which leave Constitution, because it took not the effect that hope was hoped, there were two Statutes made, the one Enacted by *Richard* the Second, the other by his Successor open; ȝer ylle hund tpentiȝ ȝcil: If any lead a Nun out of a Monastery without the King's leave, or the *Bishop's*, he shall pay 120. shillings.

In the filling of Appropriations, which were made over to the Religious Houses, the Law saith that the *Bishop* hath this power: That he could bind the Proprietaries to set out for the Vicar Incumbent, such a Convenable Portion of the In-comes, as the *Bishop* in his judgement should be pleased to allot. See *Alexander* the third to the * *Bishop* of *Worcester*. *De Prab. & dig. C. De Monach.*

And there be that are well enough perswaded, that the *Bishop* even now also ought in this Right to be acknowledged; and the ground is, for that it may be likely to stand, without injury to the Statute of Dissolution. For it seemeth by the twenty seventh of *Henry* the eighth, *c.* 28. that these Lands are to be holden in as large and ample manner, as the Proprietaries did them hold them, or ought to have done. And another Clause of the same Statute, Giveth to every Person and Persons, and Bodies Politique, &c. other than Abbots, &c. all such right, title, interest, &c. as they or any of them hath, ought, or might have had, &c. But the consideration of this, I restore to him from whom I had it; the late learned Civilian in the *Poor Vicars Plea*; where the Reader who desireth more of it, may be further satisfied.

Now it is to be observed, how far forth the Patron was to depend upon the *Bishop*, for the filling of any other Church or Oratory. Most proper to this purpose is the Emperor's Novel, which was decreed little less than eleven hundred years past, about the latter end of the fifth Century: Εἰ τὶς ἐυκλησίαν ἴδιον κτήσασθαι βούληθείη ἐν αὐτῷ κληρικὸς προκαλείσθω ἢ αὐτὸς ὁ οἰκῶν κληρικοὶ οἱ τὰς διαθήκας αὐτοῦ ταῖς κληρικαῖς χειροτονίαις καὶ ἀξίας ὀνομάσουσι, τὰς ὀνομασθείσας χειροτονείσθω, οἱ δὲ παρ' αὐτῶν ἐπιλεγήσεσθαι εἰς ἀναξίας πολύσουσιν οἱ θεῖοι κανόνες χειροτονηθῆναι, πρικαῦτα ὁ τῆς πόλεως θεοφιλὴς ὁμοίως ὃς ἂν

Henry

Henry the fourth, both for the Convenable Endowment of the Vicar, there to do Divine Service, and inform the People, and to keep Hospitality among them.

Τῶν Νεωτ. μὴ ἔχῃ. Διαλύ. in. that is, If any man shall erect an Oratory, and his desire be to present a Clerk thereunto, by himself or his Heirs, if they furnish the Clerk with a competency, and nominate (to the Bishop) such as are worthy, they may be ordain'd: but if those who are inuinated by them be rejected by the Canons, as unworthy of the Ministry, then let it be the care of the most Reverend Diocesan of the place, to present such as in his discretion he shall conceive better of. That we may the more certainly know what the Emperours mind is, it must be considered out of *Papormitan*, what is the meaning and original of the Patrons Right, which by the Canon is called *Jus Patronatus*, and by the Common Law **Advouson**. The Abbot out of the Law saith, that this is *Jus honorificum, onerosum & utile alicui competens in Ecclesia, pro eo quod Diocesani consensu Ecclesiam fundavit, construxit, vel dotavit, ipse vel is à quo causam habuit, Abb. in Rubric.* He therefore that founded a Church, (that is, *fundum dedit*, gave a piece of ground) *De Jur. Pat. C. Nobis.* He also that built a Church upon it, *C. Monasterium.* Or lastly, he that endowed the Church but *C. Pia Mentis ibid.* was thenceforth qualified with this Right of Patronage. But all this while it is especially to be noted, that all was done *Consensu Diocesani*, which seemeth to have been so requisite by that of *Clement. C. Nobis. De Jur. Patron. Si quis Ecclesiam cum assensu Diocesani construxit, ex eo Jus Patronatus acquirit.* That if *ex eo* should be refer'd to *assensu*, nothing makes a Patron but the Will of the Diocesan. And it is to bee understood, that when a man dispondeth of his temporal estate towards the Founding, Erecting, or Endowing of a Church, whatsoever shall be so conferred, after consecration, is actually delivered up, and made over to God himself; there it must needs bee, that from henceforth these things cannot properly belong either to the Bishop or the Patron: for the Emperor saith. *Quod Divini juris est, id nullius est in bonis. Instit. de Rerum Divisione. Nullius.* Only the dispensation of those things must be referr'd to Men: And to that purpose, who of all men could be more fit than the Bishop? It seemeth therefore, that the right of presenta-

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Albeit moſt of theſe Appropriations were principally in Monks and Friars, and ſuch other Religious perſons, yet were not Biſhops Sees, and Cathedral Churches, altogether free from them,

tion may be originally in the Diocesan, and we ſhall find it hath

been ſo, by a certain paſſage, recorded in the life of Biſhop *Ulrick*. Where the Author ſaith, That when any would build a Church in his Territorie, the Biſhop freely conſented both to the Erection and Conſecration: *Si conſeſtim ille conſecratæ Eccleſiæ legitimam dotem in terris & mancipiis in manum ejus celſitudinis dare non differret, &c.* which is anſwerable to what was before ſaid concerning the dowrie of a Church. It followeth in the Author. *Conſecratione quoque peracta dotéque contradita comprobato illic Præsbytero altaris Procurationem commendavit, & Eccleſiæ Advocationem firmiter legitimo hæredi Panno impoſito commendavit*: that the Conſecration being ended, and the Endowment delivered up, the care of the Alter was committed to the Prieſt allowed, and the Advouſon firmly conveighed to the lawful heir, by the putting on of a Robe. *Author vitæ Udalrici, C. 7. p. 52. edit. Auguſt. Vindel. 1595.*

It is now time to conſider how fare forth the Biſhop departed with this Right to the Lay Patron, and for what cauſes. We have ſaid, that the *Biſhops* right was not to the things themſelves, which being once appropriated to God, could be onely his, but to the diſpenſation of them, according to which is was neceſſarie, that the Biſhop ſhould diſpoſe of the preſentation, and fill the places with ſuch incumbents, as might enjoy them in Gods Right, and execute their function anſwerably to the Founders good purpoſe, This Act of the Biſhops being (as by them it was accounted) more a matter of Care than Power, was uſually underſtood by the moderate expreſſions of *Nominare, Præſentare*, or *Commendare*, ſtill ſaving the Right to God, and to themſelves only ſuch a conſcientious diſpoſition thereof, as might redound to his greater glory: This power the Biſhops tranſferred to the Lay Patron, yet ſo as it ſhould be neceſſary for the Patron to have recourſe to the Biſhop, that he might qualifie his Clerk for the Rectorie by ordination and that it ſhould be lawful for the Biſhop to deveſt the Patron of this Right according as he ſhould be moved by ſuch cauſes as were found to be of a conſiderable importance ſo it

as

seemeth by the Law where the Patrons Right is said to be such a power as I have before shewed in the Cathedral Church of *Salisbury*, to whom *Henry* the first appropriated near twenty Churches in one day: and the See of *Wincheſter*, which hath had two Benefices

in qua eos Eccleſia hucusque ſuſtinuit, De. jur. Patron. c. Quoniam. The reason that moved the Diocesan to let the Patron share with him in this prerogative, was for the Patrons encouragement; for so it must be conceived of this right, that it was an honourable priviledge; and therefore the Abbot in his definition did well to call *jus honorificum*. This reason, in respect of the Patron, took place, because of the great need which then was of those, which were able, and would be willing to erect or endow a Church; for as much as all places at their beginnings were ever unfurnisht, for we shall find in some that they had no Churches at all, but instead of a Church they were content to say prayers under a Gross in the open field: and this is reported of our own Ancestors in the Peregrination of *Wilibald*. *Sic mos eſt Saxonica gentis quod in nonnullis nobilium, bonorumque hominum prædiis, non Eccleſiam, ſed Sanctæ Crucis ſignum Domino dicatum cum magno honore almum in alto erectum ad commodam diurnæ orationis ſedulitatem ſolent habere: Hodoeperic. Hieroſolym. Wilibald. Extat ad Canisium. Tom. 4. Antiq. Lect. part. 2. pag. 486 Edit. Ingloſt. 1603.* In other places there might perhaps be Churches, but sometimes they were no better than those which are spoken of by *Asser* Bishop of *Shireburne*, in the Life of King *Alured*, Churches of so poor and mean a structure, that when the Candles were set before the Relicks, they were often times blown out by the wind which got in, not only *per oſtia Eccleſiarum*, but also *per frequentes parietum rimulas*, as the Author there hath said; insomuch that the ingenious Prince was put to the practise of his dexterity, and by occasion of this *Lanternam ex ligais & bovinis corialibus pulcherrimè conſtruere imperavit*: by an apt composure of thin horns in wood, he taught us the mystery of making a Lanthorn.

These exigencies were the causes which moved the *Bishops* to give all encouragement to the Patron, and admit him into the honourable employment of Filling the Churches, but so as upon occasion given, he might resume this right to himself, which upon the abuse thereof hath accordingly followed.

That the Laity could never yet abide the Clergy, is noted in the Law for an old saying. *De immunit. Eccl. C. Clericis. lib. 6.* And *Basil* the

anciently

anciently annexed to the Biſhops Table, the Parſonage of *Eaſtmeane*, and the Parſonage of *Hambleden*. Neither do I doubt, but the like was done in other Biſhops Sees, and other Cathedral Churches,

Emperour in the 8. Synod could ſay of the Lay-people of his time: *Adeo multos malitia in inſaniam accendit, &c. ut quòd pedes ſint minimè cogitantes legem ponere velint oculis:* That malignity had ſo ſet on fire the madneſs of ſome, that forgetting themſelves to be the feet, they would needs teach their eyes to ſee. But we are more happy, and need not make this our own complaint, being no otherwiſe troubled, than with a Learned and Religious Laity. But how the Lay-Patrons heretofore behaved themſelves in the matter in hand, we ſhall ſee. (Though I mention only the Lay; yet I excuſe not the Clergy-Patrons otherwiſe than thus, that they were but few, and not ſo likely to wrong the Church in regard of their proper intereſt.)

The Patrons abuſed their liberty many waies: if we conſult with the ſeveral Councels which have provided againſt this, we ſhall find them ſometimes preſenting illiterate and unworthy men, Prieſts of the loweſt of the people; men that can think ſo meanly of the Miniſtry, as to make ſuit to come into the Prieſts Office for a piece of bread. 1 *Sam.* 2. This is noted in the Councel at *Colen*, *Anno* 1536. where they are ſaid to preſent their own Sons and Kindred, *citra ullum delectum aut diſcrimen ſcientiæ morum & ætatis.* There alſo it is complained that there were ſome, *qui admotis nomen tantum retinquunt:* that promoted the Incumbent onely to a bare name, reſerving the Revenue to themſelves, *auſu quodam ſacrilego*, as they are cenſured by the Councel; and ſome were ſo exorbitant in this kind, that they would preſent their young Boys and Children, as if by the ſame Law of Nature, they could beget Prieſts and Men. *Concil. Palent. Conſt.* 14.

This is little better than that of *Micha*, the Man of Mount *Ephraim*; *qui ipſe ſibi fecit ſacrificulum:* though this might be well endured, that the Son ſhould make the Prieſt, when the Mother and the Founder had made the Gods. But this was done too, when there was no King in *Iſrael*, *and every man did that which was right in his own eyes*, והוה וזה סכה להעשות וזה הנכון otherwiſe ſo abominable an Act

could never have palled, as the Son of *Gerſom* hath obſerved upon the place.

if I had as good inſtruction to report of them, as I have had information to ſpeak of theſe.

And ſo far as concerning the firſt effect of Priviledges, whereby ſundry fat Benefices have been injuriouſly drawn from their own Churches, and

The Councel of *Saltzburgh*, under *Martin* the fifth, telleth us of certain Patrons that uſed to compound with the Incumbent for a moyety of the Profits, and this in the *German* Councel under *Conrade*, is ſtyled *vulnus cancroſum & ſimoniacum*. And ſee to this purpoſe the Councel of *Wormes* in 886. & ar *Presbyteri*. Others not contented with a part of the obventions made, they bargain to have half: for in the ſecond *Bracaran* Councel, C. 6. we find ſome that built their Churches, *non pro devotione fidei, ſed pro queſtus cupiditate*; not for devotion, but filthy lucre; that they might ſhare alike with the Incumbent in the offerings of the Church.

Sometimes it fell out, that the ſame Church had ſeveral Patrons, and theſe in the vacancy, for the moſt part, diſagreed about the Preſentee, and this was a great inconvenience; for in the interim during their diſcord, the Biſhop was to take away the Reliks, and ſeal up the Church. Some Patrons for their Preſentations expected to be gratified with gifts and largeſſes, and the like: and againſt this it was provided in the *Nanneten* Councel, C. 16. And the Councel at *Arles* under *Charles* the Great, expreſly forbideth the Lay-Patron, *munera exigere à Presbyt. propter commendationem Eccleſiæ*. See alſo the *Capitul. Addit.* 3. C. 63. & 30. of the Councel of *Mentz*. And it was the complaint of the *Palentine* Councel, that the Patrons Sons and Nephews were wont to exact great dinners of the Rectors, as if they would feed upon the Incumbency, and eat out their preſentation. And of theſe things (ſay the Fathers of that Synod) *Relatione certa didicimus*; we are credibly informed. *Conſe. Pal. a.* 1322. *Conſtit.* 14. We find alſo that the Patron, ſometimes for his own profit in the vacancy, would reſerve the Preſentation during his pleaſure. Therefore it was decreed by the Law of *Laps*, that all Patrons ſhould preſent after a certain time ſet down: where we are to note, that the Canons allowed the Clergy-Patron ſix monethis liberty, and the Lay-Patron but four. And though this would not be received by the Common Law, yet what needed the Statute to tell the Doctour, That he ſaw no reaſon why a Clerk ſhould have more reſpect than a Lay-man, but rather the contrarie. C. 31. whereas it is one of the greateſt puniſhments that a Church-man can have, to

unna-

unnaturally appropriated to Monkeries and Frieries, and other ſecular and religious places; which as I have ſaid, hath been partly the act of Lay-men, and partly of Eccleſiaſtical-men.

be degraded from his Miniſtry, and turned into a Lay-man. But

to go on; Some there were among the Patrons that had ſo little conſcience, as to preſent their Clerk for his money: this is ſharply reprehended in the Councel at *Tours*, *C.* 15. *Anno* 813. where alſo it is ſaid to be *vitium late diffuſum*; a corruption ſpread far and wide. Some other there were ſo wretchleſs as to rob the Church, after the Rectors deceaſe, of her dowry; *rebus mobilibus, & interdum immobilibus*; as it is noted of them in the Councel at *Sidonge*, where it is called *deteſtabilis corruptela. C. Nonnulli, &c.* and *C. Ad reſtipand.* It ſeemeth alſo by the Councel at *Meaux*. that the Prieſts were ſometimes employed by their Patrons, *ſeculari negotiatione & villicatione turpi*; in ſecular negotiations, and the meaner offices of husbandry. The Prieſts indeed are called Paſtors by the great Shepherd of *Iſrael*; but this muſt not be miſtaken, for when it is ſaid, that the Miniſter muſt attend his flock; the meaning is not, that he ſhould **keep ſheep**. Theſe and many more were the Patrons enormities, into which he that liſteth further to enquire, ſhall be ſooner weary of finding than of ſeeking them. We have reſerved for the laſt place, that which of all other is moſt horrible; 'Twas enough to debaſe the Incumbent, and deſpoil the Church, but *horrendum eſt dicere*, ſaith the third *Lateran* Councel, *C.* 45. *quod in necem Prælatorum prorumpere non formidant*: 'tis a horror to report it, that nothing would content the Patrons, but the life and bloud of the Prelates, &c.

Upon the riſing of theſe inſufferable exorbitancies, the Biſhops called for their right again; but the redreſs was not made all at once, nor ſo ſoon in one place as another; to which variety diligent heed muſt be given in reading the Councels to this purpoſe. The moſt notable Reformation was attempted in the third *Lateran* Councel, where the authority and conſent of the Biſhop is ſtrongly reinforced. *Nos enim, cum Laici non poſſint niſi jus quod habent in alios transferre hujuſmodi conceſſiones viribus carere decernimus, & penitus irritas eſſe*, &c. So *Lucius* in the Canon of the Printed Copy: but in *MS. Bibl. Bod.* they are the words of *Alexander* the third, to the Abbots, Priors, *&c.* and the whole Clergy of *York* Dioceſs. This Decree was accepted and ratified here at home, as appeareth by the Synod holden in the year 1200. where

every man is expressly forbidded *ex tenore Concilii Lateranensis, Decimas vel alia Ecclesiastica beneficia sine Episcopali authoritate de manu Laici accipere*: according to the tenor of the *Lateran* Councel, to receive any Tythes or Ecclesiastical Livings from a Lay-mans hand, otherwise than by Episcopal authority.

CAP. IV. SECT. V.

Exemptions from Tythes brought in by Pope Paschal's *favour towards all sorts of Religious men, and how they have been restrained by Pope* Adrian.

C. Ex parte tua. glos. in verb. laborum de Decim.

NOw followeth the second effect hereof; and that is, the exemption of these Religious mens possessions from payment of Tythes, which is a priviledge of the Pope alone; for Monks anciently paid Tythes of their Land, before these priviledges, as other Lay-men did. But *Paschalis* the second, casting a more favourable aspect towards Monks, and other Religious men, than any of his Predecessors before-time had done, did order together with the Councel of *Mentz*, That neither Monks, nor other Religious persons, or any other that lived in common, should pay Tythes of their own labours. Which immunity in process of time Pope *Adrian* recalled, so far as it concerned the rest of the Religious persons, and limited it to the *Cystertians*, *Hospitallers*, *Templers*, and those which were of the Order of St. *John* in *Jerusalem*, leaving onely to the rest freedom from paying Tythes of Lands newly broken up, and laboured with their own hands, and of their Garden, and of their Cattel. In which state the matter stood until *Innocent*

Eod. in dicta glos.

nocent the third's daies, who although he were in no other point of better mould than the reſt of the Popes were; yet was he in this more pitiful towards poor Incumbents of Pariſh Churches, than any of his Predeceſſours had been; who ſeeing hereby the inconveniences of beggery and ignorance that grew upon ſundry of the Parochian Prieſts, by means of theſe Priviledges, ordered in the ſecond *Lateran* Councel, holden in the year of grace 1120. that for ſuch Lands as any of the ſaid four priviledged Orders, ſhould acquire, and get after the ſaid general Councel, they ſhould pay Tythes, or compound for them as other men did, yea though they laboured them with their own hands, or manured them at their own charges. Which conſideration alſo moved *Henry* the fourth, King of this Realm, to provide by Statute, firſt, that ſuch of the Order of *Cyſtertians* as had purchaſed Bulls to be diſcharged of Tythes, ſhould be reduced into that ſtate as they were before: Then, that no Perſon, religious or ſecular, by colour of any Bulls, containing any priviledges, to be diſcharged of Diſmes pertaining to any Pariſh Church, nor put in execution, or ſhould purchaſe the like in time to come. Whereby it is very probable, that few of thoſe Lands which are now challenged to be free of Tythes by the Statute of the 31. of *Henry* the eighth, are free of Tythes indeed; for that they are no otherwiſe freed by that Statute, than that they were firſt freed in the Religious mens hands; ſo that if they were never freed in their hands, they remain ſtill charged with Tythes. But between

C. nuper Abbates de decimis.

An. 7. H. 4. c. 4.

An. 7. H. 4. c. 6.

31. *Hen.* 8. c. 13.

this interruption of not paying of Tythes, wrought by *Innocent* in the second *Lateran* Councel, and the dissolution of Monasteries, effected by *Henry* the eighth, are three hundred and thirty years; and between the fore-said Statute, made in the seventh year of *Henry* the fourth, and the subversion of the Monasteries, brought to pass by *Henry* the eighth, as hath been before remembred, are one hundred and thirty years. In which long distance of time the one from the other, it is not to be doubted but many of those Religious Houses were built and indowed, which by no possible means could be partakers of those priviledges which were abolished before the time of their erection; neither was there any reviving or renewing of these priviledges by any Pope of *Rome*, or Prince in this Realm, after they were thus first repealed by the Pope and Prince aforesaid, for ought that I have read or heard to the contrary.

So that if this matter were well understood, and the Ages and Orders of those Religious persons, from whom the claim is made, were rightly conceived, it would give great light unto the Judges to discern what Lands were exempted from the payment of Tythes, and what not: for now many are pretended to be exempted from Tythes, which never were of any of those four Orders; and if they were, yet were they not before the time of the interruption, but since.

CAP.

CAP. IV. SECT. VI.

That real Compoſitions for Tythes are the deviſe of Eccleſiaſtical Lawyers, and are to be tried by the Eccleſiaſtical Courts.

AND ſo far as concerning the ſecond effect of theſe Priviledges. Now it followeth that I ſpeak a word or two of Compoſitions, which are agreements between perſons litigant, whereby either party may know their own right, and not ſtrive again about doubtful matters. As good Laws have grown out of ill manners, ſo Compoſitions have riſen out of quarrels cauſed by priviledges, and other like exemption for matter of Tythe: whereof, although there be no ſpecial Treatiſe in the Law, as there is of the reſt, yet they are ſo often mentioned by the Decretals themſelves, as that it is not to be doubted but that they are part of the Eccleſiaſtical Law as well as the reſt are; and that they are the deviſe of the Eccleſiaſtical Lawyers, and not the conceit of the Common Lawyers, the form and ſtyle of them doth well ſhew, which favoureth wholly the manner and phraſe of writing of the Eccleſiaſtical men, and hath no touch of the Common Law at all. And if the deviſe be the Eccleſiaſtical mens, as all Biſhops Regiſters every where do ſhew, which are full of theſe Compoſitions, why ſhould not alſo the Trial be theirs, that every Cauſe might have his ending where it hath his beginning? *Eorum enim eſt legem, interpretari, quorum eſt condere.*

CAP. IV. SECT. VII.

That the curiosity of School-men, in their distinctions upon Tythes, have helped forward Appropriations and Exemptions from Tythes. The Opinion examined, as concerning the Quotity of Tythes, whether it be Moral, Ceremonial, or Judicial.

AND these are those grievances of the Church which I said the School-mens curiosity in their distinctions, either invented, or gave strength unto them after they were invented; but invent them all, I think, they did not, for that these Acts of Appropriations of Benefices were somewhat more ancient than the School-men themselves are: but the rest of the Priviledges, they either came into the world with them, or ensued anon after them; so that I may well say, they much strengthned this iniquity. For when that every man understood by their Doctrine the quotity of Tythes, or the tenth part thereof was not precisely by God's Law, (since the light of the Gospel sprang out as the day-light unto the Christians, who before sate in darkness and in the shadow of death) but that it was by the institution of the Church only; then began they freely to spoil the Church of her due Tythes, and to give away that to one Church, that was due to another. And the reason that perswadeth the School-men to this, was, that after much adoe, dividing the whole Law of *Moses* into three parts, the Moral, the Judicial, and the Cere-

Ceremonial; they did conclude, that there were three parts likewiſe in the Tythe, the one Moral, which was the neceſſary maintenance for the Miniſter, and therefore was natural and perpetual: the other Judicial, which was the number of Ten, fit, as they taught, for that People only, and therefore was poſitive and remotive: the laſt Ceremonial, and that was the myſtery contained in this Quotity, or number of Ten, which being but a ſhadow only, was aboliſhed with the Law it ſelf: whereby they did infer the preciſe number of Ten being taken away, by reaſon of the Ceremony it ſelf, a Competency now only doth remain for the Miniſter out of the Tythes: which opinion hath been well confuted of late by a very Learned man, as his Treatiſe thereof doth well ſhew; but, I fear, with leſs ſucceſs than the truth of the cauſe doth deſerve; for this is a point that toucheth many mens private benefit, and therefore ſhall have no more favour than it needs muſt.

But the deviſe whereon the School-men did build this Ceremony, is this, That as all Digits under Ten are unperfect, and do tend to Ten as to their perfectneſs; ſo all men, ſave Chriſt alone, are unperfect, and have need of Chriſt's righteouſneſs to make them perfect: Which *Abraham* well knowing, paid Tythes to *Melchiſedech*, who was the figure of Chriſt, as therein acknowledging, that himſelf, and all mankind, who were repreſented by the other nine Digits, were unperfect, by reaſon of Original Sin dwelling in them; and therefore had

Thom. in quodlibet part. 3. art. 6. q. 6.

Idem part. 22. q. 87. art. 1.

had need to be perfected by Christ, who was figured by the tenth number.

All which that we may grant to be true between Christ and all man-kind, as it is true indeed, and that Ten is the perfection of the other numbers under Ten, for that all the rest of the Digits, when they come to Ten, return back again to Ten, and are multiplied by the coupling of themselves with Ten; yet where is this proportion between Christ and Ten in the Scripture, that should make this Ceremony? which if it cannot be found any where, nor any consent of the primitive Church shewed for it, as I think it cannot be, then may it with as good authority be rejected as it is received. For albeit *Thomas Aquinas* himself was tearmed a Seraphical Doctor, that is, such a one as had a sense in the understanding of the holy Scripture above all others of his age, and that he did much profit the study of Divinity with his witty distinctions; yet is not his authority such, that it must prevail in cases of Divinity, without the authority of the Scripture, and the consent of the ancient Fathers of the primitive Church, interpreting this piece of Scripture in that sense as he doth, which would make a sweet harmony if it might be had.

Junius in 2. c. 3. Genesis.

And therefore, as to my poor sense, better said a Learned man of our time to this point, writing upon the Sabbath-day in the second of *Genesis*, which may be also proportionably understood of the Tenth, for that they were both before the Law in their very number, and were but repeated by

Moses

Moſes under the Law, becauſe they had been approved by God before the Law in the ſelf-ſame numbers: and that which he ſaith of the Sabbath is this, that albeit it hath a Ceremonial deſignation of the day, that is, that it doth figure unto us our perpetual reſt which we ſhall have in Heaven, after that there is a new Heaven and a new Earth; yet there is therein two parts, the one natural, the other poſitive; as that God ſhould have a ſeventh day of worſhip, this is natural, and therefore doth remain, becauſe it is perpetual; but that this ſeventh day of the Lord's worſhip ſhould be the ſeventh after the Creation of the world, this was poſitive, and therefore was changed by the Apoſtles and bleſſed men of the primitive Church, into the ſeventh day after the Reſurrection of our Saviour Jeſus Chriſt: which, as it is verified by him in the Sabbath, ſo may it be in like ſort vouched by like reaſon in the tenth, wherein alſo by like ſemblance there are two parts, the one natural, the other poſitive. The natural is this; that God out of all the Fruits of the Earth, the increaſe of Cattel that are worthy of him, and fit for mans uſe, ſhould have a tenth, both in the acknowledgement of his univerſal government over us, and alſo for the proviſion of his Miniſters, and therefore this remaineth: and in that ſenſe immediately after the diſſolution of the Jews Policy, the good Chriſtians of the primitive Church, as ſoon as they could get any outward form of a Church, and peace from Perſecution, received it in the very quotity, as a thing no leſs belonging to their Miniſters, than it

did

did appertain to the Priests and Levites of the Law: But that the Lord annexed these Tythes by *Moses* to the Priests and Levites for their maintenance, during the time of the dispensing of the mysteries under the Law, this is positive; and therefore changed by the good Christians in the primitive Church, from the Jews Ecclesiastiques to the Christian Ecclesiastiques.

Neither can it be thought that this number came from the Judicial part of the Law, as a fit proportion to maintain one Tribe out of the revenues of the other eleven Tribes; for that this number, or quotity, was revealed to be God's long before the Law, and before there were any such division of Tribes among the people of Israel; which then were not, but were parted afterward by *Moses* into Families, according to the number of the Twelve Sons of *Jacob*. And therefore it is not to be presumed, that the Law, which came long after, imprinted a form upon that, which was so long in being before there was any Law or Ceremony. But as the Apostles, or prime Christians, when they did first change the Day of the Sabbath, by Divine inspiration, or otherwise, from the Day of the Creation to the Day of the Resurrection, durst not substitute any other day into the place of the first day, than a seventh; for that the Lord had revealed his pleasure in many places of the Scripture as concerning that number, for his day of worship, so that no other day could be appointed for his day of worship than a seventh: So neither durst the good Christians of the primitive Church (moved no doubt with no

no other inſtinct than the other were, when they tranſlated this proviſion of Tythes for their Miniſtry from the Jewiſh Church unto their own Church) change the number of Ten into another number beſides, more or leſs: For that God had no leſs manifeſted his will in ſundry parts of the Scripture, as concerning this number, to be a number for the maintenance of his Miniſtry, than he had declared his pleaſure as concerning that other number to be a day for his Honour; challenging it every where in the Scripture, in the very quotity for his own right, and counting it robbery if it were at any time withholden from him. And therefore it may be well thought, the School-men herein did great wrong to the Church, who by their quaint diſtinctions brought this certainty into an uncertainty, which is no where to be found in Scripture. Which I am more bold to ſpeak, for that I ſee ſome have trod this path before me, and ſhewed by good demonſtration, that the turning of this quotity into a competency, is a thing nothing warrantable by the Word of God, but that the quotity ought ſtill to ſtand as a perpetual Right due to God and his Church. But hereof hitherto.

CAP.

CHAP. V.

SECT. I.

That a Bishop being Lord of a Mannor, and prime Founder of a Benefice, could not in the first erection thereof, by his own capacity, retain any Tythes in his hand, and pass the same after in Lay-fee to his Tenant, and so give cause to his Tenants of prescriptions against the Parson.

AND so having passed over this whole proviso of Law, Statute, Privilledge, Prescription, and Composition, I might well leave the turning of this stone any more, but that yet there remaineth one Prohibition of Prescription to be handled, which in my fancy is worse than all the rest, for that it draweth away from the Parochian Church her maintenance, and transferreth it upon Lay: and that which is worse, it maketh Bishops to be instruments hereof, who are to be Patrons and Defenders of Churches, and not Pillers or Pollers of the same. And yet the Authors thereof do embrace it, and kiss it as a golden Birth, or as if that *Juno* her self had been present at the Nativity thereof. And the devise is this:

A Bishop being owner of a Mannor yet not divided into Tenancies, nor having any Parsonage erected upon it, ordaineth the one, and divideth out the other; here the Bishop being seized in the whole Mannor before the said division, because he is

is a Clergy-man, is ſuppoſed to be in poſſeſſion as well of the Tythes, as of the Mannor it ſelf; and therefore after creating a Parſonage, and dividing out his Tenancies, may retain and keep to himſelf, and his ſaid Tenants, ſo much of the ſaid Mannor diſcharged of Tythes as he liſteth, and aſſign over the reſt for the maintenance of the Miniſter; and that his Tenants after may challenge exemption from Tythe, as the Biſhop did, for that they were exempted by his capacity while they were in his own hand.

Neither of which is ſo by Law; for inſomuch as a Biſhop is owner of a Mannour, and is a prime Founder of a Benefice, he hath no more right to the Tythe thereof than a meer Lay-Patron hath, who for his zeal to the Church, and to encourage others to be like affected to God's Religion as himſelf is, may have ſome ſmall penſion aſſigned him and his for ever by the Biſhop out of the ſame Benefice, in acknowledgement of the erecting, founding, or endowing thereof: but for any portion of Tythes to him or his, he could never retain any, nor can to this day, neither yet can the Biſhop himſelf, unleſs perhaps he will be like to *Ananias* and *Sapphira*, which held part of the price of their ground from the Lord, and were worthily puniſhed for the ſame. And as they cannot detain it themſelves, being Spiritual men, ſo much leſs can they paſs it over to any Lay-man; for that Lay-people, neither by God's Law, neither by Canons and Decrees of the Church, were ever capable of them: yea, it was ſo far off, that

Actorum. 5.

Ca. quamvis de decimis. & ibi Abnum. 5.

Ca. tua nobis de decimis.

that ever any Biſhops durſt infeoffee any Layman in Tythe; that whoſoever did it, was to be depoſed and excommunicated, until ſuch time as he reſtored the ſame to the Church again. And to ſay the truth, Tythes were never at any time in Biſhops as in Fee, but in very few caſes; as where the Biſhop had a Pariſh himſelf, diſtinct from other Pariſhes, for ſundry Biſhops in ſundry places had ſo, and then the Tythes of the Pariſh did belong unto them, in ſuch ſort as they do now belong unto the Incumbents thereof: Or, if the Tythe were not within any Pariſh, for then in like ſort it did belong unto the Biſhop of the Dioceſs in whoſe Territory it was; albeit, now within this Realm it belongeth unto the King: or where the Pariſhes were undiſtinguiſhed, for then were they the Biſhop's, not to convert to his own uſe, but to divide amongſt the Miniſters and Clerks which laboured in the Dioceſs under him, in Preaching, Teaching, Miniſtring of the Sacraments, and executing of other Eccleſiaſtical Functions, every one according to his deſert: Or that it were the fourth part of the Tythe, for then did it belong to the Biſhop in Law, towards his own reliefe, and the repairing of the Pariſh-Church where they grew, and not to confer or beſtow the ſame as himſelf thought beſt; which notwithſtanding now alſo is grown out of uſe, and nothing left unto the Biſhop from the Churches of his Dioceſs, beſide his Procurations and Synodals, to be paid by the Incumbents in the time of his Viſitation. Beſide which caſes, it cannot be found

found, that ever any Bishop had to doe with Tythes, much lesse to alien, dispose, and transferre the same as him listed, and to whom him listed.

CAP. V. SECT. II.

That Bishops endowments in the beginning stood not in Tythes, but in finable Lands.

FOR it is very certaine, Bishops endowments themselves, in the beginning of the Primitive Church, stood not in Tythes, but in good Temporall and finable Lands, which gracious Princes, and other good benefactors of former Ages bestowed upon them, as is doth appeare out of the first booke of the Code, where sundry Lawes of *Constantine* the great, and other gracious Emperours, even to the time of *Justinian* himselfe are recorded, both for the conferring of Lands upon the Church, and those such as should neither be barren, neither charged with Statute, or other debts of the Exchequer, as also for the conserving and safe keeping of such Lands as were in such sort conferred, and bestowed upon them: and it is manifest also out of our owne stories, both in the *Britans* time, during whose Raigne there are reported to have beene fifteene Archbishops in the See of *London*, well endowed with possessions, and if they were Archbishops, then must it necessarily also follow there were Bishops, for that these are respective one to the other. The like is written of

C. de sacrosanct. Eccl & de Epis. & Clericis tot tiul.

Authent. multo magis C. de sacra sanct Eccles.

Ipcelin of Furnis in his book of British Bishops. Stow f 37.

the Saxons Raigne, under whom the See of *Canterbury*, the See of *London*, the See of *Rochester*, and the See of *Yorke* (for these foure were first set up againe after the Saxons first received the faith at the Preaching of *Augustine*, *Melitus*, and *Justus Paulinus*) are namely reported to have beene inriched with large Dominions, and possessions, given to every of them for their maintenance. And what course hath beene held with Bishopricks erected since the Conquest, the ruinated state of them, and others do shew, amongst whose ancient livelihood is not to be found any indowment by Tythes, but such as of late came unto their hands, and that for the most part, by change of their good sineable Lands for impropriate parsonages. And therefore much to blame are some of our time, who (when as their predecessours in former ages never admitted of any impropriate parsonage into their possessions, but only in such cases as have beene before remembred) for the name and state of a Bishop will be content to make *Glaucus* change with *Diomede*, that is, give their golden Armour for the others brazen Armour: or doe like to *Roboam* did, who in stead of golden shields, that his father *Solomon* did hang up in the Temple, put in their places shields of brasse: for the change is no better, and so well know they that procure the same, otherwise would they never so instantly desire it.

Hen. Huntington lib. 3.

Charta reg. Ethelberti, & charta Will. primi Stow f. 77.

Homer, Iliad.

Regum. l. 6. 14.

CAP. V. SECT. III.

That the turning of Biſhops indowments into tenthes, or Tythes for impropriate Parſonages is unſutable to the firſt inſtitution, and very dangerous.

AND therefore an unſutable deviſe was that, and contrary to the courſe of former Ages, which was procured in the firſt year of the late bleſſed Queene, (not, as I thinke, by her owne deſiring, for ſhee (good Lady) did in this as ſhee was directed, but upon ſome other policie) that it ſhould be lawfull for her to take away ſo much ſutable Land, from any of the Biſhops as ſhee pleaſed, and to give them back again in lieu thereof tenthes, or Parſonages impropriate, which hath patcht them up againe but with unſutable pieces to their coate; whereby they are both brought into obloquie, as though they detained the due proviſion of the Parochian Church from it, and are ſet in a way ready to be overthrown if every bird have his own feather again.

Authent de alienand. aut permut. rebus Eccleſ &c §. ſi minus

And therefore thoſe good Emperours are moſt worthy of commendations, that when they had any occaſion to make change of Landes with the Church, would ſtill allow them the like in value of better; for a ſmall gain it is unto a Prince for a few thouſands of increaſe of temporarie benefices unto his Exchequer, to draw a perpetuall loſſe upon a Church, or Biſhoprick: for ſo deer ought the Spirituall ſtate to be unto a Prince (upon

whom God hath bestowed so many Kingdomes, and other things of price as hee hath done, and put such an infinite number of people in subjection under his feet) that hee would not in any case be hard with God, but think every greatest liberality towards God and the Church to be the best.

For certaine it is the Empire and Church do not much differ the one from the other: for as the Empire doth govern the outward man, and frameth him by outward policie to be a good and loyall subject to the state: So also the Church framed the inward man by the word of God, and causeth him not only to be a dutifull subject unto his Prince, but also to be an acceptable servant unto his Maker: So that there must be had as well an awfull care of those things that are consecrated to God, as there is a heedfull regard had of those things that belong unto the good of the Common state: for the Church was not made of God for the Common-wealth, but the Common-wealth for the Church. And therefore most gracious hath been the consideration of our deare Soveraigne, who to stop all importunate suits made to Bishops, for the granting away of any of their revenues to himselfe, or any other, and to meet with the too easie facility of many Bishops, in yeilding unto such suits, of his Christian and Princely piety and care hath made a Law, whereby to preserve the Church possessions from alienation, or diminution, that they may remain, and continue, according to the true intent of their foundation, to their successours for ever, to the uses and purposes therein limited.

I ic. § si minus Authem. ut supra.

Anno primo Jacob. Regis. c 3.

CAP.

CAP. V. SECT. IV.

That it had been a worthy work in the firſt reformers of Religion, if they had returned to every Pariſh their own Parſonage; and the diſlike that God may ſeem to have conceived of that.

BUT here is occaſion offered by the example of our gracious King, to wiſh that ſuch as were authors to the King, for the diſſolving of Monaſteries, and other houſes of Religion, had been likewiſe Councellers to him for the reſtoring of all appropriated Parſonages and Tythes, which were as it were, in captivity under thoſe houſes of Religion unto their proper pariſhes from whence they were taken. Which had been a memorable work, and eaſie to have been perſwaded, the King having ſo many great mountaines of temporalities and Seas of goods, and chattels come unto his hand: ſo that theſe ſpiritualities would have ſeemed matter of ſmall account unto him in compariſon of thoſe other great riches and poſſeſſions, that came unto him. Which if it had been done, how bleſſed a ſtate and Church had this been, when every congregation ſhould have a ſufficient proviſion to maintaine a learned Preacher among them: for ſo was it by the firſt inſtitution, and ſo continued, till violence, and ſuperſtition changed it. But I fear thoſe men which began this worthy work, had not ſuch a ſincere mind towards Almighty God in this reformation, as they ought

to have had, but that they ſought therein their own advancement, more than they did the glory of God; which I doubt mee, leſt God hath remembred in ſome of their poſterity, which being left in great ſtate, have either ſo vaniſht away, as that their place is ſcarce to be found, or elſe do ſo continue, as that their poſterity ever ſince hath been as it were in a minority, ſo that they are as though they were not, great in place, but ſmall in reputation: yea the three faireſt branches, or boughs that ever were in the world, iſſuing out of that tree, under whoſe ſhadow all theſe things were done, are quite gone, and live by no other poſterity, but by their own worthy fame, and glorious acts, which they did in their life time; which alſo now being gone, do follow them, and ſo ſhall doe unto the worlds end, for they were all three memorable Worthies in their place. So dangerous a thing it is, to mix our own ambition, or any other carnall conſideration with Gods glory. But, God be thanked, ſuch is the careſull conſideration of our moſt gracious Governour, that now is, in this behalfe, that it may be hoped, that God will remember him, and his poſterity in goodneſs, according to all that good that hee hath done for the Church, that hee and his poſterity after him, may ſit upon his Seat ſo long as the Sunne and Moon endures: for certainly, his godly and gracious comportment, hath been ſuch hitherto, as that he may be verily thought to be a man according unto the heart of God, as *David* was. But now

now to the loſſe that comes to the Church by theſe Impropriations.

Whilſt the Parochian Churches ſtood in their eſſentialities, that is, while they did enjoy the naturall endowments due unto their place, that is, all manner of Tythes, and other Eccleſiaſticall duties, growing and ariſing within the compaſſe of their Pariſh, due by the word of God, they preached unto their Congregation, they prayed for them, they miniſtred unto them the Sacraments, they kept hoſpitality among their Pariſhioners and relieved the poore, ſo farre as their portion would reach unto; which was a comely thing to behold, acceptable to God, comfortable to their Pariſhioners, and convenable to their calling: but after the ſame were appropriated to Religious houſes, theſe good courſes were much diſguiſed: for albeit thoſe Religious men, to whom theſe Parochian Churches were annexed, did much pray for thoſe congregations, as they pretended, from whom they had the fat of the Benefices, yet they Preached little to them, kept ſmall hoſpitality among them, or did any other ſpirituall work belonging to any Paſtorall charge; yet notwithſtanding the whole inſtitution, for which benefices in the begining were erected, was not altogether extinct in them, but there was ſome outward ſhape or forme of the firſt ordinance left them, ſo farre forth, as that they made continuall prayers and interceſſions to God for them: but when it came once into the Laities hands, there was not ſo much as a foot-ſtep left of the firſt inſtitution, for

they neither preach unto the people, pray for them, nor keep any hospitality among them, but spend all the whole revenues of the Church, upon their private uses; which many times are unfit for such Spirituall provision to be spent in: so that for the benefit of the Church, the return of them might be well wisht, albeit in so farre as they are perplexed and intricated by the Lawes of this Land, with private mens states, it would be hard to be performed, for the changing of them would be much like, as if a man should move one stone in a vaulted work, such as the stony rooses of many Cathedrall Churches and Colledges are, where the taking of one stone away is the jeopardy of the whole building: But yet let those to whom this doth appertaine, consider whether in this it were better to please God, than man.

CHAP. VI.

SECT. I.

That Tythes are a Parochian right, and how Parishes in the Christian world, came first to be instituted.

BUT now to return thither where I left: as every good Bishop, or any of his Clergie, did win any Country village, the Latins call *Pagus*, to the Faith, so they erected up a Church there, and appointed a Pastor or Minister over them, to in-

form

form them in the Law of God, and to minister the Sacraments unto them: and set out for his maintenance the tythe of that Page, or Village, to which he was assigned Pastor: which they did in Tythes, rather than in any other provision, both because it was the Lords inheritance in all ages, and appointed by him for the maintenance of such as served in his Tabernacle, during the dispensation of the mysteries of the Law, and now was returned again into Gods hand by the expiration of the demise of them, made unto the Levites, during the said time of dispensation; and also because the people would be more easily induced to part with one part out of every ten, of all the fruites of their grounds, and labours of their hands, unto the Minister, than if there had beene any other regular imposition laid upon them: for certaine it is, Villages and Pages came more hardly and more lately unto the Faith, than great Townes and Cities did; and thereupon grew that name of opposition, which was between Christians that dwelt in Cities, and the Infidels that dwelt in Pages, that the one were called Pagans the other were called Christians, taking their names upon the difference of the places where they dwelt. But from these Pages, (as I have said) came first the use and practice of Tythes in the Christian world, insomuch as after, when any Law was made, as concerning Tythes, they held them evermore for a Parochian right onely, and in no sort at the disposition of the Bishop but in such cases as before is rehearsed; insomuch, that if a Bishop challenged any Church in his Dioces, he challenged it not it respect

Hostiensis De origine Monachatus.

C. Cùm contingat de Decim. verb. de jure col. in glos.

respect of any fee simple hee had in it, but in regard of the Spirituall Jurisdiction he had over it. And therefore the Authors of this opinion were farre out of the way, when as they thought the Bishop had like right in the Tythes of a Church of his Patronage, to give and bestow them as hee listeth, as hee hath in his demeanes, and other his Temporal Lands, either to leese them out, or divide them into Tenancies, as him best liketh.

Ab.ca nuper de Decim. & cap. deputati de Judiciis nu. 16.

Neither is that case cleere or without question, whereby they pretend a Bishop being seised in a Mannor, may prescribe the Tythes of the demeanes thereof, by an immemoriall prescription for him and his Tenants, and Farmers of yeares, and Tenants at will, to be exonerated, acquitted, and priviledged from all Tythes growing thereupon: which if it be against another person than himselfe, may hap to bee true, although perhaps also that be questionable, for that it is not long since Lay-people were capable of that right: neither could themselves by Law of the Church at any time grant such Spirituall Rights as these are, to a Lay-man, either in *Feudum*, or *Emphiteusim*, without danger of Excommunication, or deposition of their owne place, as hath beene before shewed. But if himself, or his predecessours were Parsons there, either in the right of their Bishoprick, as hath been of late before remembred, or that the Benefice was annexed unto their See, for the provision of their Table, as many Bishopricks had some one or more Benefices appropriate unto them to this purpose, then could they not prescribe

Ab cap. ad hoc De Decimis num. 4.

ſcribe the Tythes in ſuch ſort as is pretended: For, albeit no preſcription proceeds without poſſeſſion, yet no man can preſcribe againſt himſelf, although hee be in poſſeſſion; for that evermore there muſt be two perſons in a preſcription, the one which doth preſcribe, the other againſt whom it is preſcribed, and therefore in theſe caſes it is never ſaid they hold their Tythes by preſcription, but in the right of their Church, or Parſonage. In either of which caſes, if they were Lords of the Mannor, and Parſons of the Parſonage together, it is not to bee thought they would ſo reſpect the good of their Farmer, as that they would either hurt their Church, or prejudice their own Table, for their Farmers ſake: which they muſt do, if they ſuffer a Preſcription to runne againſt the Church, or themſelves to exempt the demeanes of the Mannor from payment of Tythes, which were due both to the Church, and themſelves: For they were men, that both knew in their conſcience, how much they were bound unto the Church in this behalfe: and they were not ignorant what prejudice they ſhould do unto themſelves, if by preſcription they ſhould yeild to exempt ſo neceſſary a proviſion for the maintenance of their Hoſpitality, as the Tythes of the demeane of a whole Mannor, and their tenencies are: for no ſmall part of their commendation ſtood in thoſe dayes in their hoſpitality, and therefore it is not to be preſumed, that they would eaſily cut off any proviſion that was fit for the ſame. Beſides, if by either of theſe two wayes, the Biſhop was Parſon of the place, then did the

fruites

fruites of the Benefice, during every Vacation of the Bishoprick, not come to the King, (as they now doe, whereby the Parsonage and Mannor are both consolidated into one, for that they are now both holden to be Temporalties) but the Parsonages came to the Archbishops of the Province, as a spirituality granted to his See by priviledge, during the vacancy of the Sees of such Bishops as were in his Province, as may appear by the Lord Archbishops Records of *Canterbury*; so that it cannot be thought any prescription could runne in these times, being so often interrupted by vacancies as they were. Which being well considered, the conclusion is very doubtfull, whether ever any prescription ran in this case, neither would it easily bee believed by those that know the course of Antiquity, but that there hath a judgment passed in this part, and therefore will I stay my self here, and prosecute this point no further.

Ex Registro Archiepiscopi Cant.

CAP. VI. SECT. II.

That Tythes of Minerals are due.

I Intended to say nothing in this Treatise of the Tythes of Minerals, and other subterraneous bodies, because I know by Law, they are holden by the like right, as the Tythes of those things are, which grow in the upper face of the earth; but yet because I see there is a question made of them, by some that will make every thing controversable, that is due unto the Church, I will satisfy also their

their curiosity: And therefore, for Mettals, and other substances which are digged out of the bowels of the Earth, and therefore are called *Fossilia*: this is certaine, that what God worketh here in the superficies of the Earth, for those things that spring out of the earth, by the heat of the Sunne, the temperature of the Air, and the influence of the Celestiall Bodies; the same he effecteth below in the depth of the Earth, for the generation of Mettals, and other subterraneous bodies, by the heat and cold of the Earth, that is included in the bowels thereof: For by the heat, hee raiseth up vapours and exhalations in the matrix thereof, as the matter of those subterraneous bodies: but by the cold, he drieth, thickneth, hardneth, and indurateth the same into a Mettall, or Minerall, whereby hee giveth, as it were, a forme unto it. And as the disposition of every exhalation so compacted and drawne together is finer or grosser, better or colder, so is the Mettall or Minerall, or other subterraneous body, more noble or more base: yea, somtimes by reason of this diversity of exhalations and vapours, drawne together at one time, are divers conditions of Mettals there confounded together, whereof some are noble, as Gold, Silver, and Copper, some other are of lesse estimate, as Tin, Lead, and such like. Neither doe these grow onely in the begining, but they renew againe when they are digged up. (as Trees and Plants in the upper face of the Earth do rise out of the rootes and stemmes of those trees which have

Erastus tractat. de orig. Metallorum.

have been cut downe) if the place of their new generation be prepared accordingly. For whereas the place of their generation is farre below in the Earth, Nature, of a certain modestly in her selfe, will not yeild to the generation of these subterraneous bodies, but in secret places, far remote from the sight of the Sun, and the privity of other Meteoricall bodies, which are under the firmament. And by that meanes it hapneth, that these Minerall bodies are rarely known and perceived to renew againe, for that being once exposed to the light of the Sunne, they are seldome or never closed up againe, by reason of the greatnesse of the gulfe that is made in opening of them. But yet the nature of them is such, that if the like were there to prepared accordingly, they would conceive anew, which is a thing so notorious in Quarries of stone, which are lesse abashed at the sight of the Sunne, and the presence of other Meteoricall bodies in their generation, that the Law it selfe, and other good Authors have set it downe for an undoubted experience, that being digged up, they do renew againe, by the nature and disposition of the mould wherein they are ingendred. For some Earths doe so naturally yeild stones, and other minerals out of them, as others bring forth Corne, Hay, and other fruits: which if it be true in those bodies which are in the upper crust of the Earth, why not also in those bodies which are found and framed below in the Matrix thereof? And if these bodies doe both ingender and renew, which are conceived so farre below in the Navell of the Earth

ff. Soluto Matrimonio l. fructus eos. § 13. Plin. l. 36. c. 15. & 18. de naturali Hist.

Strabo l. 5.

Earth, why is not Tythe due of them, as well as it is of other fruits that are in the summities or height of the Earth? Whether is it, that Gods hand lesse laboureth in the procreation of these subterraneous bodies, than it doth in the ripening and quickning of that fruit, that springs out of the upper face of the Earth? But that is farre otherwise, for here, in these upper fruits, one planteth, another watereth, and God only gives the increase: But in the other Minerall bodies, God alone doth all, for he only is the planter, he is the waterer, and he gives the increase alone. Or is it that God hath less delight to be honoured with these hid treasures of the Earth, than he hath to be worshipped with the labour of the plow, or the increase of the cattell of the field? But, that this is not so, it is Plain by the glorious Temple that *Solomon* made; which had not only Cedar trees for the roof thereof, and Algummin wood for the ornaments thereof, but also had quarry stone for the walls thereof, and gold of *Parvaim* for the beautifying of it, and for the overlaying of it within. And of all other kind of Mettals, Gold is first remembred in the Scripture, immediately after the creation of the World, so that God himself may seem to have a speciall regard of this Mettall above all the rest, for that this alone above all the rest, by purifying is not diminished. Or is it that God loveth his Ministers lesse than other men, so that he would have the Laity to have all the precious things of the Earth, and his Ministers to have no part of any other thing, but that which is vulgar and

2. *Chron.* *cap.* 2.

Genes. 2. *vers.* 11. & 12.

and common? But how unlike that is, who seeth not, when hee seeth that God hath committed unto them the inestimable treasures of his word, in comparison whereof, both these upper fruits of the earth, and those hid treasures below, are meere drosse and corruption? and therefore it is not like, when he hath committed unto them those great matters, hee would deny unto them these smaller blessings. Or is it, that there hath beene paid Tythes of the upper fruit of the earth already, and therefore cannot Tythe be twice demanded of one ground in one yeare, according to a new overruled doctrin? But that opinion is both contrary to Law many hundred yeares obtained in the Church without contradiction, whereby it is ordained, that as often as the earth fructifieth in one yeare, so often shall Tythes in the same yeare bee paid of it: and also it is contrary to Divinity and reason, that it should bee otherwise. For when as God hath given thee more Harvest or more Vintages in one yeare, is it not both godly and reasonable, as God hath increased his blessings towards thee, so thou also shouldest rise in thankfulnes towards him? For, where every one hath received more grace or more favour, there ought he to be more thankfull: but God for lack of this correspondency in thankfulnesse, bring thy nine parts, for thine ingratitude towards him, to a tenth only. For certainely so hee is able to do, by sending deluge and drought upon the earth, by bringing barrennesse upon it, by destroying that which is sprung out of the earth already, by storme and tempest,

Ca. ex parte de Decimis, & ibi Al. 18.

tempeſt, by the Graſhopper and the Caterpiller: for all this hath bee threatned to all thoſe that are unthankfull this way, neither is the Lords hand more ſhortned now than it was then. Whereas notwithſtanding to the contrary, hee hath promiſed great kindneſſe unto ſuch as ſhall pay their Tythes truely and cheerfully, as that hee will open the windowes of heaven, and powre out his bleſſings without meaſure upon them. *Hilarem enim datorem amat Deus.* Beſides this, the earth that bringeth out mettals in the matrix of the earth, is not the ſame that bringeth out corne and graſſe in the top of the earth: for that earth that is the mother of mettals, being preſt down farr into the bowels of the earth, can yeild no ſuſtenance, to thoſe fruits that grow ſo many fathoms above it, to which it conferres nothing ſave that it doth ſupport and beare up that other earth, which nouriſheth the plants and fruits of the upper earth, whoſe ſuſtenance is not fetch't deep out of the earth, but is ſucht out of that earth which is within one cubit, or two of the top of the earth: which may eaſily be perceived by thoſe fruits and trees that grow upon hard rockes neere to the top of the earth, whoſe food, although it be neer unto the top of the earth yet do they flouriſh, and ſtand faſt, as other trees and fruits doe, which have more fat and deep mould under them. And therefore cannot the Tything of thoſe things which are above, excuſe the Tything of the treaſures that are below, albeit the concluſion were true, that two things are not to be paid out of one ground in one

yeare, for these are not one ground, and the conclusion it selfe is erroneous, and therefore I conclude this point thus: Since Mettals and minerals, and other subterraneous bodies are in no lesse Obligation to God, than other fruits of the earth are, there must be no lesse Tythes paid of them, than are of other fruits of the earth: for that these are the inward fruits of the earth, as well as those are the outward, and therefore of like things, there must be like judgment and like consequence. And thus much as concerning the Tythes of Mettals and Minerals.

CAP. VI. SECT. III.

That Tythes of Turves be due.

AND now because I am in this matter of Tythes, I will shape an answer to one doubt that is made, as concerning the Tythes of Turves, that is, of earth disposed, and prepared for fewell, which are said not to be Tytheable, and that upon this reason: That Tythes are not paid of the earth it selfe, but of those things which spring out of the earth: which opinion is true, if it be understood of earth not separated from the body, and masse of the rest of the earth. For if Tythes should be yearly paid thereof, as it is paid of other things that grow out of the earth, all the whole earth in a short time would become the Clergies. But if it be meant of earth that is severed from the rest of the masse, and globe of the earth, then is it other wise

wiſe. For that earth that is thus ſever'd from the other earth, is no more part of that earth from whence it is ſevered, than a mans hand, or leg being ſever'd from the body, is part of his body after it is cut off from it. And therefore of this earth ſo provided for fewell, may Tythes as well be paid, as of any other fewell of wood, cole, or otherwiſe that is provided to be burnt. For there is one reaſon of things, when they are united together in one body, and another of thoſe things, when they are divided from the ſame body: for ſo long as they are in one and the ſelfe ſame body, they follow the nature of the whole, but when they are divided, then is there another conſideration of them. *Separatorum enim ſeperata eſt ratio, & ex ſeperatis non infertur de uno ad aliud.* Corne, Graſſe, and ſuch like, while they ſtand, are not Tytheable, although the Tythe then is in them *pro indiviſo*: For while that they ſtand, they are part of the earth upon which they ſtand, and therefore ſo long untythable, becauſe the earth it ſelf is untytheable. But if they be cut down, then are they to be Tythed, becauſe they are now no longer parts of the earth, but bodies by themſelves ſeparated from the earth, ſo that now the not tything of them is penall: Of which ſort are turves ſeperated from the reſt of the maſſe of the earth. Neither is this my opinion alone, but it was *Linwoods* long agoe, and other Eccleſiaſticall writers, who not only make Turfe Tytheable, when it is prepared for fire, but alſo great rods, and ſmall twigges, ſtickes, and chips of timber, buts, and roots of trees, thornes, bryers,

L. finali. ff. de calumniatoribus.

Provincia de decim. c. ſancta, & ibi Linwood verbo turbarum.

L. *Ligni appellatione* §. 5 & 7. ff. de legat. 3.

walnut shels, and nut shels, weeds, colles, and colebrands (called *Titiones*, because they are so burnt as they shall not make a smoake) cowshards, which the Law calls *Editus boum*. All which a man can use to no other purpose than to burne: for where wood lackes, these succeed in place of wood, and are called by the name of wood, and are in like obligation, as concerning the Tythe due thereout, as wood it self is; *Ubicunque enim est eadem ratio, vel eadem aquitas, ibi debet esse eadem juris dispositio.* And therefore not in that, that Turves sometimes were gremiall earth, they are to bee discharged of Tythe: but in that they are accounted for Fewel by the law, when they are so prepared to be burnt, they are to pay Tythes in like sort, as other things applyed to that use do.

L. *Illud* ff. *ad legem Aquiliam*

CAP. VI. SECT. IV.

That the cognisance of barren heath, and waste grounds belongeth to the Ecclesiasticall Courts, and what every of them are.

AND so farre as concerning the Prohibitions which arise out of this proviso. Now it followeth that I speake somthing of the next proviso, which is concerning the Tythes of barren heath, and waste ground, and the Prohibitions thereupon

2. *Ed.* 6. *cap.* 13.

This proviso hath two branches, the one for comparative barren heath, and waste ground, the other for absolute barren heath, and waste,

for either of which is assigned a time of seven years either for the paiment of such Tythes, as before the time of their improvement, and converting to arable, they were charged with, or for the free and absolute discharge of them from all manner of Tythes for seaven whole yeares next after their improvement ended and determined. For so I take the Statute meant, when as it made the one Tytheable, the other not, for if otherwise they had beene both in one predicament of barrennesse, the Statute had not made the one free from Tythe for so many yeares as it doth, and charged the other all that time with Tythe.

For these two kindes of grounds, although the Statute say nothing, which is comparative barren, which is absolute, yet reason telleth us, that is comparative that hath a positive under it, and a superlative above it. And therefore that is comparative waste, barren, or heath, in respect whereof there is some other ground more or lesse waste, heath, or barren, so that it hath simply and positively in it some condition of heath, waste, or barren: but if it hath nothing of any of these qualities in it, then is it neither heath, barren or waste, howsoever long otherwise it hath lien unmanured, and not turned to tillage: For it is not the turning of a ground to tillage that makes it heath, barren, or waste, but it is the ill disposition of the ground it self, subject to these inconveniences, that causeth it not to be turned to tillage, for no man will willingly till that, where the gaine of the tillage will not quit

the cost and labour of husbandry, as for the most part it falleth out in these grounds that they doe vse.

Glos. L licet. C. de loca. & conducto verbo sterilitates.

Barren ground therefore simply, is that which being eared, yeilded not the seede again, or at the most, yeilded so small advantage for the tillage, as that the tenant after that he hath paid his rente, hath not the worth of half his seed again, much like vnto that ground whereof the Scripture speaketh, whose barrennesse is such, as being eared and sowed, neither the Mower filleth his hand, neither the Gleaner his lap with the yeild thereof. These grounds are not only called *Steriles* of the Latines, but also *Infœcundæ, Infrugiferæ, & steriles*, for the excessiue barrennesse that is in them: and the Greeks upon like occasion terme such conditioned grounds, ἄγονα, ἄκαρπα, τέγγα, ἄφορα, & ἄγονα, in which sense, mony not put to vsury is by the Law called barren mony, and *Aristotle* calleth it fruitlesse mony: for that mony was not devised thereby to increase mony, as greedy vsurers in all ages have done, but that by the meanes thereof men might ease the difficulties, and necessities of change of one kind of thing for another, as a horse for an Oxe, sheep for a Goat, Iron for brasse, and such like: for there is nothing that may not be esteemed by mony, and the vse of mony, is the bearing of mony, whereby it is commonly said, that mony is lost by the vse thereof, not that mony doth perish or decay by vse, for we see the contrary: but that, for mony, though mony go through a thousand mens hands, yet it is still of the same value,

L. si quis usuras. ff. de eo qui pro tutore.

Arist. l. 1. politicarum.

Arist. 4. Ethicorum cap. 1.

and

and remaineth in her proper essence or being: but that the use of mony is in the laying of it out, and that by the use thereof, mony passeth from him whose it was, and the propriety thereof goeth to another, and therefore as to the first owner it is spent, and lost: without which loosing, mony naturally gaineth nothing; for lay it up in a coffer or chest never so long, it will never be the more in number, although perhaps as S. *James* saith, *It will gather a rust and canker, and that rust and canker, will be a witnesse against them which so hoard it up from the service of God, and the Common-wealth, in the day of the Lord*: So then, as that mony is barren, that lyeth still, and bringeth out nothing, so is that ground barren, that being tilled, yeildeth no fruit, or at the most, so little as the gaines will not recompence the charge. *James* c 5. 3.

Although heath ground, and barren ground be almost Synonomies, yet to speak properly, heath is as it were an effect of barrennesse, for that there is no ground that bringeth forth heath, but for the most part it is barren. And therefore as heath it self is an unfruitfull kind of shrubs, and is good almost for nothing but for the fire; for that neither growing or cut down, it hath any beneficiall use at all for the Common-wealth: so also the ground it springeth out of, hath neither faireneſſe to the eye, nor goodneſſe to the yeild, but is commonly either a black sowre ground, that hath no sweetneſſe at all in it, or is a drie hungry soyle,

such as evermore cryeth give, give, and never restoreth ought again.

Waste is that which for the unfruitfulnesse thereof hath layen time out of mind unmanured, in which sense it is all one with barren ground: or it is such ground as for the charge of hedging, ditching, fencing, and tilling no man will manure.

Proverb. 12.

Our forefathers anciently comprised all these three under one name, calling them all by the name of *Novalia*, that is, new-broken-up ground, not onely because they were not broken up in the memorie of man before, but also, for that being eared, they yeilded little or no fruit at all: and therefore the interpreters of the Law defining what *Novalia* are, say, that they are such grounds as before the tillage thereof were *inutilia*; and example them out, in Mountaines, Marshes, Thickets, and such other unprofitable ground, as out of which before the stocking of them up, and converting them to tillage, the Church took little or no benefit at all. And those are the same or cosen German to those which this Statute calleth heath, barren, and waste, for they are one and the very selfe same with them, in all the chiefe points, for which they are excepted out of the Statute.

C. commissum de decimis verbo inutilia.

So then now, there is no further question what is heath, barren, and waste ground, but who shall trie the matter of this quality, whether the Ecclesiasticall Judge, in whose continuall possession this triall hath been untill now of late, that under colour of this Statute, it hath bin incroched upon as it may appear by all the Titles of the Ecclesiasti-

call

call Law, where there is any mention of the Tythes of new broken up ground, and the decrees of the Law givers in the ſame, between the Monaſteries challenging them by graunt, and the Parochian Miniſters of the Pariſhes where they grew, claiming the ſame by right: Or the Temporall Judges whoſe is the Cogniſance of the Title, and Tenure of the ground, as alſo is the ſetting, letting, buying, ſelling, and other alienating of the ſame.

For the point it ſelfe, the Statute maketh no mention but paſſeth it over with ſilence, and therefore it is to be preſumed that it meant, that it ſhould there reſt, where it was before the making of the Statute: for the Statute was not made in derogation of the Eccleſiaſticall proceedings, that were before, but in affirmance thereof, as the whole driſt of the ſaid Statute doth ſhew.

And if the Statute had meant otherwiſe, it would ſurely have expreſſed it either in the proviſo it ſelf, or after in the derogatory clauſe; where it maketh an enumeration of ſuch things as it intended ſhould be exempted from the tryall of the Eccleſiaſticall Law, and by vertue of this Statute, ſhould not be compriſed under the ſame, among which there is no word of this proviſo, or any other in the ſame Statute before named.

Neither is it unto the purpoſe, that the Common Law of this Land taketh knowledge of the Tenure and Title of Lands, and ſuch other complements belonging to the ſame; for theſe things that are here in queſtion, are no part of thoſe Legall eſſences, which the Law requireth to the

Title

Title and Tenure thereof, as is Fee ſimple, Fee-taile, and other of like nature, according to the learning of that Law, but theſe are certaine accidents over and beſide the Tenure of the Land which may be preſent or abſent without the injurie of the Title: as God many times turnes floods into wildernesſe, and ſprings of water again into drineſſe: and a fruitfull Land makes hee barren for the wickednesſe of them that dwell therein, and yet the Title or Tenure of the ground is not changed by theſe changes of qualities, but remaines the ſelfe ſame that it was: ſo that theſe things are no more ſubject to the ordering of the Common Law, than to judge & determine what mould is white and what is blacke, what ground will bear wheat, what barley, what oats, for theſe things are no matters of skill of Law, that they need to be fetcht out of bookes, but they are matters of common experience, which every country man can as well skill of, as the greateſt Lawyer that is, and therefore the Law in this caſe is not deſirous of any curious proofe, but contenteth it ſelfe onely with the depoſitions of two or three honeſt men, which ſpeake ſenſibly and feelingly to the point that in hand, which is enough to direct any wiſe Judge in his ſentence, ſo that it needs not theſe long circumſtances of twelve men to teach the Judge what, and how truly the witneſſes have depoſed. For if every quality of the ground reſteth in the mouths of twelve men only, then ſhould no man be able to ſay out of the mouth of a witneſs, and pronounce thereupon, this ground is mountaine, this is plaine,

this

this is meadowe, this is arable, unleſſe hee were warranted by the verdit of twelve men thereunto; which if it be an abſurditie to hold, then ſure it is a like abſurditie to ſay, that barren, heath, and waſte cannot be pronounced without a Jurie, for that theſe things are like obvious to ſenſe, and of like qualities as the others are.

And I pray you, when they have drawn it unto their tryall, what do they in effect otherwiſe than the Eccleſiaſticall Judge would or ſhould have done, if it had remained ſtill under him? for do they give credit ſimply to the conceit of the Jurie, as touching that which hath beene declared, and pleaded in the cauſe before them, or do not the Judges themſelves rather make a brieſe of all that hath beene pleaded in the cauſe before them, and thereof make as it were a verdit, and put the ſame in the mouth of the twelve for their verdit, before they goe from the barr? So that the whole weight of the cauſe ſtandeth rather in the Judges direction, in ſuch ſort as it is at the Eccleſiaſticall Law than it doth in the mouth of the Jurie; for the Jurie men for the moſt part, are ſimple people, and ſcarce ſoure of the twelve underſtand their evidence: for that it may ſeeme rather to be a matter of ſuperſtition than of good policie, to reſerve a matter to their verdit, when as they ſay no other thing, than that the Judge taught them before, *Stultum eſt timere ne quid faciat per plures, quod fieri poteſt per paucos*; for albeit perhaps ſome capricious fellow of the Jurie, upon the confidence of his own brain, ſometimes ſtart aſide from that which the Judge hath

hath told him, and draw the reſt of his fellowes, as ſo many ſheepe after him, yet for the moſt part the Judges voice is their direction, their loadſtone, and the North pole to guide them in this buſineſſe. Beſides in this proviſo, as in ſome other precedent, there is a great diſadvantage offered to the Clergy, which they much complain of, and that is, that in caſes of this nature, they are compelled to ſuffer triall under them, who are in a manner parties unto the ſuit, by reaſon of the intereſt they have therein, either in preſent, or in conſequence; ſo that many now adayes (learning too late by other mens harmes what the event in their own cauſe will be) chuſe rather to loſe their right, than to venture their cauſe upon ſuch partiall Judges, as the twelve men are.

CHAP. VI. SECT. V.

That the Boughes of great Trees are tytheable, and ſo alſo are the bodies, but in the caſe of the Statute only.

AND ſo ſub as concerning thoſe probibitions which are forced out of this Statute, for naturally they grow not out thereof: ſo that I might now paſſe even to the other branch of my diviſion, that is, of ſuch matters as are now held by the Common Lawyers, to bee in a certaine meaſure onely of the Eccleſiaſticall proceeding, but were anciently wholly of the Eccleſiaſticall cognizance; but that the name of the Statute, *De Sylua cedua*, and

offering

offering it selfe unto mee in the conclusion of this Statute of *Edward* the sixth, gives mee occasion to speake something thereof, before I come to the rest.

This Statute, as the words thereof do shew, was made in behalfe of the Laitie against the Clergie, for the exemption of great Woods of twenty yeares growth and upward, from the payment of Tythes; and that in three cases onely, where the wood was great, when it was xx. yeares of age and upward, where it was sold to Merchants, either to the profit of the owner himselfe, or in ayde of the King in his warres; so that without these cases, it seemeth the Statute intended no further exemption: for Statutes are things of strict Law, and are, no further to bee extended, than the words thereof give matter thereunto, especially when the thing it selfe naturally was liable to ordinary course of the Law, as other things of like nature are, and the Statute comes in derogation of their ordinary course: as in this case, great timber anciently was no lesse tytheable than small trees are, and so by nature ought to be, if the Statute were not to the contrary; yet notwithstanding these limitations of the same, if great wood bee cut downe to any other use than to sale, as to build, or to burne to a mans owne use, a prohibition in this case lyeth, and yet there is no Identitie of reason to extend it, nor any absurdity would follow, if it were not extended; for here is neither money sought, (which gave occasion unto the Law-givers to make this Statute of exemption) neither is it an unnaturall

unnaturall thing, for to pay Tythes of great wood, for before this time they were paid, and by the Law of God, it seems, they ought to be paid, for that he that is taught, ought to communicate to him that teacheth him in all things: and therefore since the reason that moved the Law-givers to order it so in one case, ceaseth in the other, there is no reason of exemption; and when there is not an Identitie of reason in the things that are in demand, there can no sound inference be brought to from the one to the other, for of severall things there is a severall reason, and a severall consequent: neither can there bee framed thereof a good implication, either positively, or remotively: neither hath this interpretation of theirs any warrant of Law for it, save that it hath beene so defined and decided: but what is that to the purpose, if it hath beene wrested and wronged contrary to the true sense of the Statute, and that by those that take benefit thereby, whose partiality being taken away, the thing it selfe would easily turne againe to his owne nature, and right would take place?

The reason they yeild for the exemption of great woods of the ages aforesaid, although to themselves it be plausible, yet to others it is strange, as namely, that great Trees are part of the Free-hold, and that men use not to pay Tythes of their free-hold, but of those things which spring out of their free-hold, as out of Corne, Grasse, Fruit, and such other; whereas indeed the tallest Timber tree, that is, if it were as high as the highest Cedar

Plowd. in Soby contra Molyns

in

in *Lebanon*, is no more part of the inheritance or free hold, than the loweſt bramble that groweth in the field; for they are both equally part of the ground wherein they grow, and doe take alike nouriſhment and ſuſtenance from the ſame; neither do they differ in that they are trees the one from the other, *ſecundùm magis & minus*, as the Logicians ſay; but in that, the one is a great tree, and the other a ſmall ſhrub: and the cauſe of this proviſion here in *England* for theſe great trees, was not for that one was more of the inheritance than the other, but for that the one yeildeth more profite to the commonwealth than the other, and therefore they have made the cutting downe of the one, more penall than the other: as in like caſe by the Civile Law; whoſoever privily cutteth down, or barketh a Vine, an Olive, or a Fig-tree, or doth any other unlawfull act, whereby any fruitfull tree, or any Timber tree doth periſh and decay, it is Theft; and it is puniſhed in the double value of the hurt which is done, and if he be Tenant to the ground which hath done this villany, he loſeth his hold: which commeth not of that, that one kind of Tree hath more ſtate in the ground than an other hath, but that the Law hath reſpected, the neceſſary uſe of the one more than the other. *ff. Arborum furtim cæſarum toto tit.*

By the Civil law, although this word, Wood, be generall, yet it is thus diſtinguiſhed, that ſome is wood, ſome is Timber, which the Law cals *Materia*. Timber is that which is fit to build or underprop withall: Wood is whatſoever is provided for fewell, ſo that under that name there paſſeth *L. Ligni appellatione de Legi 3. & L. Carbonum ff de verbi ſignificat.*

Reed

Reed, Cole, Turfe, Cow-dung, and whatſoever is any where ordinarily uſed for fewell. Timber is of a higher conſideration than wood is, inſomuch as if a man bequeath unto an other all his wood that is in grove-field, there ſhall not paſſe by this legacie, ſuch Trees as are cut down for Timber: but if they were dottered Trees, or the owner thereof purpoſed them for fewell, and ſo cut them out into billet, or faggot, in ſuch ſort, as there could be no other uſe thereof than to burne, then it is otherwiſe: for by this meanes, of great wood, it is become ſmall wood, as being cut out in ſhides or ſplinters, fit for to burne. So that in the reckoning of the Civile Law, Timber ſtands not only in the nature of the wood it ſelfe, but is in the deſtination and purpoſe of the owner, who according to his good liking may make that wood which is fit for Timber, fire-wood, or timber: which if it were ſo in account with the great Lawyers of this Land, the Church ſhould have more Tythe of Wood appointed for fewell, and leſſe ſuit for the ſame.

L. Ligni appellatione, §. Oſilius. & §. idem ff. de legat. 3.

As they exempt the bodies of great Trees above xx. years growth, from payment of Tythes, ſo alſo they free the boughs thereof, upon this reaſon, that the boughs thereof are fit and ſerviceable for building, which although happily may be in ſome of them that are next to the Trunck of the tree, yet it is farre otherwiſe in thoſe that are more remote from the ſame, whereof there can be no other uſe, than to burne: and therefore the Law preciſely holds, in caſe where wood is bequeathed

Plowd. ut ſupr.

queathed, by which is meant Fire-wood only, unleſs the Teſtator otherwiſe expreſs his mind, the lops of Timber trees, which the Law calls *Superamenta materiarum* are bequeathed, for that the lops have not that uſe that the Timber hath, that is, to build or prop up withal, but they ſerve to burn onely: By which ſeveral ends, there is ſeveral conſiderations and account made of them. Neither is it to the purpoſe, that they alledge for the defence hereof, that the acceſſorie followeth the nature of the principal, for that rule is not true in every acceſſory, but only in ſuch, wherein is the like reaſon as in the principal, which in the trunck and lop of a tree cannot be alike for building.

L. ligni Appellat. §. Oſilius De Leg. & Fod. 3.

L. Eiſi. C. de Prædiis minorum.

Further, how the Boughs of a tree that are of the ſame ſubſtance, as the body of the tree is, ſhould be acceſſories to the tree, I ſee not, for nothing can be an acceſſory to another that is of the ſame nature and ſubſtance as the other is; as the legge, or hand, are no acceſſories to the body, for that the legge or hand are of the ſame ſubſtance that the body is: The Child, neither while it is in the Mothers wombe, neither after it is borne, is an acceſſory to the Mother, for while it is in the Mothers wombe, it is part of the wombe, and after it is ſevered from her wombe, it is a man or woman like principal as her ſelfe is. But that which is an acceſſory to another, muſt be of another nature than the principal is; ſo in natural living creatures, haire; hooſes, hornes, and finnes, and ſuch other like excrements, are acceſſories to

L. 1. ff. de ventre. inſpiciendo.

the creature whose they are, for that they are of a farre different nature from the bodies, out of which they come: and so in other natural things not living, as the Earth it selfe is, the Trees, Grasse, and fruit that spring out of the same, are accessories thereto, Further, in Civile matters, expences and executions are accessories to the causes out of which they rise: and in Marriage, Dowries, and Joynters are accounted accessories to them, for that without Marriage, neither Joynter nor Dowrie can stand. Usury is said to be an accessory to the principal, not in respect that the proper subject of either of them is mony, and so there is one substance of nature of them both; but in regard of the dependency the one hath of the other; for he that will make Challenge to Usury, must first prove there is a principal. But for the better clearing of these matters of accessory and principal, we must know that in bodies whose substance is all one, There are some parts like, which the Philosophers call *partes similares*; some other unlike, being likwise called of them *partes dissimilares*, which in no sort are accessories one to another, but make one continued body of both, which the Law calls *συναμφω*: Similar parts are such, as have one substance, form and figure, as the trunk or body of a tree is all one in inward essence, and outward shape; Dissimilar parts are those, which have one inward nature with the other, but are divers in outward shew, as the boughs and rootes of the Tree are divers between themselves, and different from the body, and yet

L. dotis ff. de jure dotium.

all agree in one substance, and have all the general name of Wood, whereby they are discharged from being accessaries the one to the other, and yet they are not under one capacity of service, or one comprehension of Law, because they are unlike one to the other; and of unlike things, there is unlike reason, and unlike consequence.

Now upon these grounds to exempt Timber Trees wholly from the service of him, that is Lord as well of the tall woods, as of the low shrubs, is very hard; for though himselfe dwells not in houses that are made with mans hand, nor hath any need of tall Trees to repaire his Tabernacle, or prop up his dwelling: yet since he hath left such behind him, as have charge of his flock, and feed them in word and work until he come, and they dwell in earthly habitations, as other men do, and their edifices and buldings have need of repaire, in like sort as other mortal mens houses have, being all in like manner subject to rottennes and corruption; great reason it had been to have allowed him some proportion of these great woods, towards his servants necessary uses, during the time of their service here, and if not in the very tenth it selfe, yet in the xxx. xl. or L. part of the same, that God thereby might have been as well acknowleged to be the Lord of the great Oakes of the Forest, and that by him they have their length, breadth, and thickness, as he is accepted and reputed to be Lord of the small brambles and bushes of the field: for as now the case standeth, God may either seem to have forgot

himselfe, that he hath not made timber trees tytheable, as he hath done other smaller woods, especially having such occasion to use them, both in the Chancels of Churches that are dedicated to his uses, and also in the buildings and repairings of his Ministers houses, who supply his roome in their severall Congregations, until he return to judgement; or that may well be objected against us, in allowing such things for Tythes as us please, and disallowing the rest, as was by that ancient Father of the Church *Tertullian*, objected against the Senate of *Rome*, who being intreated by the Emperour *Tiberius* (for the strange wonders and miracles he heard to be wrought by our Saviour Jesus Christ) that he might be entertained among the number of their Gods, refused so to do, for that they heard our Saviour was a Jealous God, and did in no sort admit the society and fellowship of other Gods; which this grave Father hearing, (although many years after) said merrily, although wisely, That God should be God, if men would let him.

And thus farre of those cases which are held to be absolutely of the Ecclesiastical cognisance, and yet notwithstanding are eclipsed by interposition of sundry contrary matters.

CHAP.

CHAP. VII.

SECT. I.

In what caſes Diffamatory words belong to the Eccleſiaſtical, and what to the Common Law,

NOw as concerning thoſe things which have been accounted but in a certain meaſure of the Eccleſiaſtical cogniſance, and yet notwithſtanding have anciently, in a manner, been tryed wholly at the Eccleſiaſtical Courts, ſuch as are matters of Diffamation, and matters of Baſtardie, both which now a daies are much challenged by the Temporal Courts, to be of their cogniſance. But here firſt of Diffamation, then of Baſterdie.

To diffame therefore is, as *Bartol* ſaith, to utter reproachful ſpeeches of another, with an intent to raiſe up an ill fame of him; and therefore himſelfe expreſſeth the act it ſelfe in theſe words, *Diffamare, eſt in mala fama ponere.* *Bartol l. turpia ff. de legat. 3.*

Albeit Diffamations properly conſiſt in words, yet may they alſo be done by writing, as by Diffamatory Libels, and alſo by deeds, as by ſignes and geſtures of reproach; for theſe no leſs ſhew the malicious mind of the Diffamer, than words do. *Lindwood v. authoritate verb. quacunque de cauſa. in gloſ. de ſent. excom.*

Diffamatory words are uttered either in ſome ſcoffing or jeiting manner, ſo as facete and merry men uſe to do, to make the company merry wherein

they are; or they are ſpoken by ſome that have ſome weakeneſs, or diſtemperature in their brain, either by drink, phrenſie, or other lightneſs, or by any raſhneſs in their tongue: or they are poured out upon ſome rankor and malice, by ſome that envy another, with intent to diffame him, and ſpread abroad a matter of diſgrace upon him.

Ariſt. 4. Ethic. cap. antepenult. If they be ſpoken in a jeſting manner to make the company merry, if it be in a fine ſort delivered, it is by the Greeks called *εὐτραπελία*, and is by *Ariſtotle* held to be a vertue, although by S. *Paul* *Epheſ. 5. 4.* it is condemned as a vice; but if it be in homely and groſſe ſort deliverd, then is it accounted to be a kind of rudeneſs or ruſticitie; but whether way ſo ever they be uttered, there is, for the moſt part, no advantage taken againſt them, unleſs thereby there follow any diſcredit to the party, upon whom ſuch jeſts are broken, for then are they not without blame, *Noxius enim ludus eſt in vitio*, neither can that be called a jeſt or ſport, whereby a mans good name is hurt, or any crime impoſed upon him.

Extra de preſumpt. c. 1.

ff. ad l. Aquiliam, l. nam ludus.

The like may be ſaid of thoſe which ſpeak hardly of any by the lubricitie of their tongue, or weakeneſs of their braine, who for that they are not thought to ſpeake ſuch words maliciouſly, paſs for the moſt part unpuniſhed, *Lubricum enim linguæ non fabilè ad pœnam trahendum eſt*, no though a man in this caſe ſpeak ill of the Prince himſelfe: And the Civile Law is ſo farre from taking hold of ſuch words in theſe caſes, that the Emperour himſelfe hath ſaid of them thus: *Si id ex levitate proceſſe-*

ff. ad l. Jul. Majeſtatis l. famoſi.

proceſſerit, contemnendum eſt; ſi ex inſania, miſeratione dignißimum eſt. C. Si quis Imperatoris maledixerit

But if the cauſe of ſuch words be rankor or malice, then are they altogether to be puniſhed, for that there can be no juſt excuſe made for them.

Such diffamatory words as proceed of malice, imply either matters of crime, or matters of defect. Bohic. cap. Siculpa de injuriis Linwood provinc. de ſent. excomm. cap. 1. verb, malicioſe.

Such as imply matters of Crime, either are ſuch crimes which it is expedient for the Common-wealth to know, as Treaſon, Felonie, Murther, Inceſt, Adultery, and ſuch like, to the end they may receive due puniſhment, whereby God may be pleaſed, and the Common-wealth ſatifieth: Or they are ſuch crimes or faults, which it is not expedient for the Common-wealth to be acquainted with; as where one calleth one prodigal, or ſpend-thrift: For albeit it be expedient for the Common-wealth, that no man miſ-pend his eſtate, for that the Common-wealth hath as it were an intereſt in every private Subjects ſtate, yet this is rather his own hurt, than any other mans, and that which he ſpends away unthriftily, commonly turnes to another better Subjects gaine, where the Common-wealth is relieved in one, that it loſt in another; and for the moſt part there is no great corruption of manners in the example thereof. Bobic. ubi ſupt.

A great while it was before the Lawes of this Land took knowledg of Diffamations, as counting them things belonging to the Spiritual Law, ſo they were duly proſecured, as may appear by

Term. 12. Hen. 7. fol. 22. Regist. pag. 43.

certain Judgments and consultations which have issued out thereon: but now let men prosecute them never so duely, yet Prohibitions goe out on them daily, and sundry others are drawn to the common Law Courts by action of the case; wherein they have so infranchised themselves, as that they take upon them to confine the Ecclesiastical Law how farre it shall goe therein. Which limitations notwithstanding, as farre as I can conceive, are but distinctions without differences, and so are in very deed but bare *Synonimies*, that is, diverse names expressing one thing: for all the words in the said limitation inferre no more than this, that Ecclesiastical men are not to deale in matters of Diffamation, but where the matter of Diffamation is onely Ecclesiastical; and yet I reverence the Author thereof as a great man, and of like excellencie in this Law, as *Papinian* was in the other Law, and this I think to be commendation enough, for never any Lawyer in former age had more commendation, or eulogie of wit than himselfe had.

C. ad L. Juliam. repetundarum. l. 1. & 2.

ff. de aqua plu. arcen. da l. 1. §. denique.

In the first of the cases, if a man proceed by ordinary course of Law, either for the punishment or the sin, as by presenting the offender to the Ordinary, or indicting him before the Temporal Judge, or by admonishing him by any charitable denunciation, with purpose to a mend him, and to recall him from such offensive waies as he is charged to walke in: Or to do any thing in Judgement for the defence of his own cause, as in objecting some thing against the party himselfe, or his witnesses

witneſſes, either for the elevating, or diſcrediting of the truth of the cauſe, or the teſtimony of the witneſſes; there can be no advantage taken againſt him for he cannot be ſaid to defame, which uſeth the liberty, the Law gives him: albeit in this caſe ſome adviſe that a man ſhall object none of theſe matters againſt another in Judgment, but when his cauſe neceſſarily requires ſuch things to be ſpoken for the defence thereof, and that the party that objecteth them doth proteſt he doth it not with a calumnious mind, but that the defence of his cauſe otherwiſe would not be juſtified.

L. Proculus & l. fluminum in fin. ff. de damno infecto ff. de regul. juris. l. ſaltum 7. non videtur

But if any man do any of theſe things malitiouſly, with purpoſe rather to utter his own cankred ſtomacke, than that he would benefit the Common-wealth thereby, then is he puniſhable: for although it be behoofefull for the Common-wealth that bad mens faults ſhould be manifeſted, that ſo wickedneſs may be puniſhed, yet is it not fit they ſhould be uttered in reproach and choller.

L. Labeo de ſupell. legat. C. de famoſis libel. l. 1. ff. ad. l. Aquileam l. ſi ita vulneratus.

Of the ſecond ſort, although there be ſome that contain petty crimes, yet are they many times ſo frivolous, as that they yeeld no action: for frivolous and ſmall things the Law regardeth not.

For ſuch Diffamations as ariſe upon defects, if the defects be ſuch that the contagion thereof is to be feared, unleſs the people be forewarned of the danger that may enſue thereon, as in caſes of Leproſy, the Plague, the French-Pox, and other like infectious diſeaſes, and that it be revealed with a ſincere mind, rather to cauſe men to refrain their company for feare of the infection, than

of

of any malicious humors against the party, thereby to reproach him, it is no Diffamation. But if it be uttered in any spleen or choller against the party defective, then it is actionable; for it is an uncivile part to lay open another mans defects: but if the defects be such, as it nothing availeth the Common-wealth they should be known; as where a man objecteth against another any imperfection of his mind, or deformitie of his body, which he had from his cradle, or hath happened to him by any accident without any default of his, and cannot be easily remedied; or reproacheth him with any thing in his state or condition, wherewith he is not justly to be charged, neither is there any just cause offered the diffamer why he should use such disgracefull speeches against the other, then it is altogether punishable: For that such things tend onely to contumilie and despite, which the Law seeketh by all means to represse, for that thereby charity between man and man is violated, and the peace of the Common-wealth is many times broken and disturbed.

C. quando & quib. quarta pars l. 2. lib. 10.

The proceeding in these causes in the Civile Law was of two sorts: for it was either *ad publicam vindictam*, or else, *ad privatum interesse*, as the party injured made his choice thereof.

Ad Publicam vindictam, was when the party Diffamed, sought, to have the Diffamer recant his words, or to undergoe some open and infamous punishment for his rash and malicious speeches, whereby it might be publickly known abroad that he did the other wrong.

ff. ad L. Corneliam l. in constitutionibus. §. ult.

But

But *Ad privatum intereſſe*, was when he ſought not the recalling of the ſlaunderous ſpeeches which were given out againſt him, but eſteemed his credit at ſome great rate (as that he would not for a thouſand pounds; or more or leſs quantity according as the worth and calling of the perſon is) have had ſuch ſpeeches gone out of him, and ſo ſeekes to have his credit ſalved by recompence in money, as the Judge or Jurie, upon proof of his worth and place, ſhall eſteem it, and taxe it. In theſe actions, he that ſued *ad publicam vindictam*, and had followed ſo farre, as that he had brought it to a Recantation or a publike diſgrace, could not have recompence of his credit by money, ſave onely in caſe of commutation: neither he that had got his credit valued by money, could have a publique diſgrace alſo inflicted for his ſatisfaction, but what way he had choſen, with that he muſt have reſted contented, for that irefull mens wraths otherwiſe would never have been ſatisfied, and the proſecutions of theſe actions otherwiſe would be confounded.

ff. de verborum obligationib. ſtipulationum l. plane ff. de rejudicat. l. ſi quis ab alio.

Theſe two kinds of proceedings the Princes and Sages of former ages ſeem to have ſorted to the two kinds of Juriſdiction that are amongſt us, the one Spiritual, the other Temporal: and therefore the Law of the Land it ſelfe ſaith, in a cauſe of Diffamation, when money is not demanded, but a thing done for puniſhment of ſin, which is all one, as when the Civilians ſay, when it is done *ad publicam vindictam*, it ſhall be tryed in the Spiritual Courts: whereupon by argument of

contra-

contrary ſence it followeth, that where the puniſhment of ſin is not required, but amends in money is demanded, there it is to be tryed in the Temporal Court, for the Law would that every man ſhould have his remedy agreeable to reaſon in what ſort him beſt liketh. And therefore be the fault what it may be, that the words of the Diffamation do ſound unto, as long as it ſtands but in words, and the party doth not take upon him to juſtifie the matter that is compriſed under thoſe words, and doth ſeeke but for the puniſhment of the ſlanderous words onely, ſo long it is to be tryed at the Spiritual Law; for the Law ſpeaketh in general in caſes of Diffamation, where puniſhment of ſin onely is required: ſo that where a man is called Traitor, Felon, or Murtherer, or any other crime bolonging unto the Common-Law, being every one of them words of great Diffamation, ſo the party therein ſeeke puniſhment onely, and not his private intereſt, there the Spiritual Law is to hold plea thereof. For where the Law doth not diſtinguiſh, there nither ought we to diſtinguiſh: but the Law hath ſaid in general, that cauſe of Diffamation, whoſe proſecution is thus qualified, do belong unto the tryal of the Spiritual Law; and therefore even thoſe caſes before remembred where the party followeth this kind of proſecutions, ought by that Law to belong unto the Spiritual Court, as on the contrary ſide Spiritual cauſes of Diffamation being propounded to a pecuniarie end ought to be ordered in a Temporal Court.

But where any man takes upon him to juſtifie the

the crime that he hath objected, there either Court is to hold plea of the crime that properly belongeth to that Court, for that now words are no longer in queſtion, but matter is in tryal, whether the party diffamed hath indeed committed that offence that he is charged withall or no; which can be tryed in no other Court, than in that to which it doth properly appertain. And that this was the courſe anciently held in matters of Diffamation between the Eccleſiaſtical and Common Law, it is manifeſt by the Statute of 2. of *Edward* the 3. chapter 11. where although the Statute taxeth the perverſe dealing of ſuch, who when they had been indicted before the Sheriffes in their Return, and after delivered by Inqueſt before the Juſtice of the Aſſiſe, did ſue the indictors in the Spiritual Court, ſurmiſing againſt them that they had diffamed them, and therefore in that caſe forbad the like ſuits; for that juſtice thereby was hindered, and many people were feared to indict Offenders: yet that Statute plainly ſheweth that in all other caſes of Diffamation riſing out of Temporal crimes beſide this, the Eccleſiaſtical Law had the cogniſance: and that this was forbidden, it was not for that words of this nature, could not be cenſured as the Eccleſiaſtical Law, when puniſhment of ſin onely is required, but for that it was not fit that thoſe things, which had been once ordered in one Court, ſhould be called again to examination in another: and therefore the general proceeding in matters of Diffamation, is not there prohibited, but the particular croſſing of matters

after

after judgment is there reprehended.

So that the distinction whereof I formerly spake, which taketh upon it to determine when a case of Diffamation is of the Temporal cognisance, and when of the Ecclesiastical, cannot here take place: for that it is contrary to the former Statute or Decree that divided these cases into Temporal or Ecclesiastical cognisance by the varietie of the prosecution thereof, and that it is contrarie to the ancient practise that hath confirmed this prosecution in either Court, but especially in the Ecclesiastical Court, which hath still holden the trial of such Diffamations wherein sin hath been only sought to be punished, until now of late, that men have stept over the bankes, of their authority and confounded either Jurisdiction with the promiscuous acts one of another; when as the Statute it self is plain, that the Authors of this Statute or Decree, whethersoever you call it, which set these bounds to either Law, in proceeding upon matters of Diffamation, respected not so much the quality of the crime, upon which the Diffamation grew, as the manner of proceeding therein, ayming in the one at publique vindict, which is to be sought out of the Ecclesiastical Law, and in the other at private interest, which is to be had out of the Temporal Law.

Neither is an action of Diffamation, a matter of so light esteem or quality, (a mans fame or good name being in equal ballance with his life) as that it should be drawn away to be attendant on any other action that is of smaller weight or importance

tance than it ſelfe is: for this is one of thoſe Actions which for the ſpecial preheminence thereof, are called *Actiones præjudiciales*, that is, ſuch that draw ſmaller cauſes unto them, but themſelves are drawn of none other, but ſuch as are like principal, or greater than themſeves are. So that unleſs the manner of proceeding bring theſe cauſes under the compaſs of the Common Law, in ſuch ſort as I have before ſhewed, the coupling of them with another matter of the ſame Law, will hardly bring them under the tryal thereof: for that there be few actions greater then it ſelfe is, ſo that if the crime be Eccleſiaſtical, howſoever it toucheth a Temporall cauſe, the tryal ſhall be ſtill at the Eccleſiaſtical Law. And the ſame that I ſay of Diffamations riſing out of Eccleſiaſtical crimes, I hold alſo to be true in Diffamations ſpringing out of Temporal crimes, where puniſhment is required for the offence committed, and amends in money is not demanded, unleſs happily that grow of penance injoyned, which the offender will redeem by giving mony to the Judge, or to the party grieved. And this I take to be a farre better limitation for either Law, having the ground of the Civile Law, and a Statute of the Common Law, and common reaſon it ſelfe for it, than the other diviſe is, which ſo diſtinguiſheth this buſineſs, as ſtill it makes it reſt in the mouth of the Judge, which cauſe of Diffamation is meer ſpiritual, and which not, which were not to be done if there were clear dealing in the matter: for Lawes are ſo to be made, as that as little as may be, be left to

the

the discretion of the Judge, but all be expressed as farre as the nature of the cause will give leave: which albeit it be hard to do, for the variety of the cases that every day happen, never thought on before, yet that is to be laboured so farre as may be; for this liberty of leaving many things to the Judges discretion, is many times great occasion of confusion in Judicature, saying sometimes this, and sometimes that, as his private humor shall lead him: and therefore a plain distinction between both the Laws were best, that every man may see, and say what is proper to either of them.

CAP. VII. SECT. II.

That the suit of Bastardie, as well in the principal as in the incident, belongs unto the Ecclesiastical Law.

AND thus farr as concerning matters of Diffamation. Now followeth that I speake of matters of Bastardie.

Bastardie is an unlawfull state of birth, disabled by divine and humane Lawes to succeed in inheritance.

Of Bastards, some are begot and borne of single women, (in which ranke also I put widows) some other of married women.

Of single women, some are such as a man may make his wife, if himselfe be sole, and unmarried, as those that are kept as Concubines in place of a mans wife; some other are such as a man cannot make

make his wife, although himſelfe be ſole and unmarried, for that either they are already precontracted to ſome other, or that they be in ſo neer a degree of affinity or conſanguinity one to the other, that the marriage would be damnable, and the iſſue thereof unlawfull.

Of ſuch as are begotten of ſingle women, by ſingle men, who are in caſe to marrie them if they will, ſome are called by the Civile Law *Filii Naturales*, becauſe they were begot by ſuch as they held for their wives, and yet were not their wives who might be legitimate by ſundry waies, as hereafter ſhall be ſhewed.

Some other begot of ſingle women if they were begot in vage luſt, without any purpoſe to hold ſuch a one for a Concubine, but upon a deſire onely to ſatisfy a mans preſent luſt, whether they were begotten by married men or ſingle men, were called *Spurii*, who for the mouſt part are putative children, and their father is not otherwiſe known then by the Mothers confeſſion, which ſome times ſaith true, ſome times otherwiſe. *Iſidore* ſaith, they were ſo calledc becauſe they were born out of purity, for that ſuch kinde of luſt is contrary to holy Matrimony, whoſe bed is undefiled, and therefore the other corrupt and abominable.

But where any was borne of a woman ſingle or married, that proſtituted her ſelfe to every mans pleaſure, and made publick profeſſion of her ſelfe to be an harlot, (ſuch as they are whom the Law calleth *Scorta*) theſe were called *Manzeres*.

Thoſe which were begotten of married women

were called *Nothi*, because they seemed to be his children whom the marriage doth shew, but are not; no otherwise than some seavers are called *Nothæ*, that is, bastard seavers, because they imitate the tertian or quartan Feaver in heat, and other accidents, but yet are neither tertians nor quartans, as the learned Physitians well know: but these are counted so to be Bastards, if either the husband were so long absent from his wife, as by no possibility of Nature the Child could be his; or that the Adulterer and Adulteress were so known to keep company together, as that by just account of time, it could not fall out to be any other mans Child but the Adulterers himself: and yet in these very cases within this Realm, unless the husband be all the time of the impossibility beyond the Sea, the Rule of the Law holds true, *Pater is est quem nuptiæ demonstrant.*

The most nefarious and last kind of Bastards are they whom the Law calleth *Incestuosi*, which are begot between Ascendents and Descendents *in infinitum*, and between Collaterals, so far as the Divine prohibition, and the right interpretation thereof doth stretch it self.

The effects of these sorts of Bastardies are diverse.

First, it staineth the bloud, for that he that is a Bastard can neither Challenge Honour nor Arms from the Father or Mother, for that he was begot and born out of Matrimony, which is the first step to Honour: and therefore the Apostle calleth Marriage Honourable, whereupon it must follow, that

Heb. 13 4.

that the opposite thereof is shame ; for, albeit it is no sin for a Bastard to be a Bastard, yet it is a defect in him to be such a one, and a thing easily subject to reproach.

Secondly, it repelleth him that is a Bastard from all succession, descending from the Father or the Mother, whether it be in Goods or Lands, unless there be some other collateral provision made for the same, for that all such Laws and Statutes as are made to any of these purposes, were intended to the benefit of such as are legitimate, and are next of kin by lawfull succession, and not by unlawfull conjunction.

To legitimate him that was a Bastard, when there could no claime be made unto his birthright but by grace, among the *Romans* were sundry waies; first were the Father of the Bastard (they being both single persons) married the woman, by whom he begot the child; secondly, where the Father did by his last Will and Testament, or by some publick instrument subscribed by witness, name him to be his natural and lawfull son, or simply his son, without the addition of any of these two words, base, or natural, and there withall did make him his heire, which could not be, but in such cases only, where the Father had no other natural and lawfull child left alive.

Thirdly, whereas the Prince by his Rescript, or the Senate by their Decree, did do any one that credit, as to grant them the favour of legitimation, which was done, for the most part, in such cases

ually, where either the father of the Childe, or the Childe himselfe, offered himselfe to be attendant on the Court or Prince.

In this Realm, none of the aforesaid legitimations take place, as far as I can learn, but only that which is done by Parliament, and that very rarely; for besides those that King *Henry* the eight did in the variety and mutability of his mind, towards his own issue, I think there cannot be many examples shewed: for, as for that which is wrought by subsequent Marriage, being a thing anciently prosed by the Clergy of this Land, to be admitted in like sort, as it is used in other Lands where the Ecclesiasticall Law taketh place; it was rejected by the Earls and Barons with one voyce, and answer was made, that they would not change the Laws of the Realm in that point, which to that time had been used and approved. All these cases of Bastardy in other Lands, whether they be such or not such, are triable by the Ecclesiasticall Law: But here with us it is questionable, to what Law and how far they doe appertaine, whether to the Ecclesiasticall or Temporall,

28. 8. cap. 7

1. Mar. 1. parliament. cap. 1.

For the matter of Bastardy, what it is, the Ecclesiasticall Law, and the Temporall differ not, but there is a diversity between them in the prosecution thereof, for the Ecclesiasticall Law bringeth it two waies in Judgement; the one incidently, the other principally; but the Common Law maketh two sorts thereof, the one generall, the other speciall: But first of the Ecclesiastical division, then of the Temporall.

Bastar-

Baſtardy is then ſaid to be incidently propounded when it is laid in bar of ſome other thing, that is principally commenced; as when one ſueth for an inheritance that he pretendeth is due unto him by his nativity, an other croſſeth him therein, by objecting againſt him baſtardy, with purpoſe to exclude him from his action in the inheritance: here the bar is in the incident, becauſe it comes excluciveley to the action of inheritance, but the action for the inheritance it ſelfe was in the principall, for that it was begun in conſideration of the inheritance, and not with intent to prove himſelfe legitimate: which happily he never dreamed of when he firſt entered his action for the inheritance. In which caſe, he which is charged with the baſtardie, may require himſelfe to be admitted to prove himſelfe legitimate, before the Eccleſiaſtical Judge and to be pronounced to be ſuch a one, *Ad Curiam enim Regiam non pertinent agnoſcere de Baſtardia*: Againſt which the Law of the Land doth not oppoſe it ſelfe, but acknowledge it to be the right of the Church. And yet to avoid all ſubtil and ſurreptitious dealing in this behalfe, it hath ſet down a wary and cautelous form of proceeding, by which the ſame ſhall be brought unto the Ordinary, and ſuch as have intereſt in the ſuit, may have notice thereof, and time to object in form of Law againſt the proofes and witneſſes of him that pretends himſelfe to be a *Mulier*, if they ſo think good: and what ſhall be certified herein by the Ordinary, as concerning the nativity of him that is burthened to be a baſtard, (that is, whether he

Glanvill lib. 7. cap. 13.

9. Hen. 6. ca. 11.

Glanvill lib. 7. cap. 5. he were born before or after his Parents marriage) shall be supplyed in the Kings Court, either by judging for, or against the Inheritance.

But Bastardie is then taken to be principally propounded, when either one finding himself to be grieved with some malicious speech of his adversary, reproaching him with Bastardie, or himself fearing to be impeached in his good name, or right, doth take a course to cheer his adversary by calling into the Law him or them by whom he is reproached, or feareth to bee impeached in his right and credit, to see him, to prove himself legitimate, and to alledge and object against it, if they ought have, or can have to the contrary: which if either they do not, or doing to the utmost what they can, can bring no good matter against his proof, but that it stands still good and effectual in Law, to all intents and purposes whatsoever (although perhaps hereby he shall not be able to carry the inheritance, both for that it appertaineth not to the Ecclesiastical Law, to judge of Lands, Tenements or Hereditaments; & also for that there is a precise form set down by Statute, how suits of this nature shall be recovered) yet if no oppolite or contradicter appear herein, and the suit was onely taken in hand against such, as either openly reproached him, or secretly buzzed abroad slanderous speeches, as concerning his legitimation: It is not to be doubted, but by accident also it will be good for the inheritance it self, for where a mans legitimation is sufficiently proved, thereon followeth all things which naturally

9. Hen. 6. 6. 11.

ly thereto belong. But if any man urge the form of the Statute, being interessed therein, then must it necessarily be followed, for that otherwise it would be thought, all that was done before, so far as it may concern the inheritance, although it were but in a consequence, were done by collusion. This kind of proceeding hath been much more in use in former times then it is now, and never any opposition made against it: but now it goeth not altogether cleer without contradiction, as many other things are offensively taken, which notwithstanding have good ground, and sufficient warrant for them.

And so far as concerning the Ecclesiastical proceedings in this business: Now to the Temporal sorts of them.

General Bastardie is so called, because it comes in incidently, and is in gross objected against some that sue in a matter principal, to disapoint his suit. This suit, because it is of the Ecclesiastical cognisance, it is sent by the Kings writ to the Ordinary, with certain additions for more perspicuity of the inquirie thereof; as that whether he that is charged with the Bastardie, were born in lawfull Matrimony, or out of Matrimony, or whether he were born before his Father and Mother were lawfully contracted together in Matrimony, or after. All which the Ordinary makes inquirie upon by his own Ordinary and pastoral authority; for that matters of Bastardy do originally belong to the Ecclesiastical Court, and not the Temporal: And as he findes the truth of the matter by due examination to be

Lib. Intrat. fol. 35.

this, or that, so he pronounceth for the same in his own Consistory, and makes certificate thereupon to the Kings Court accordingly, and as he pronounceth; so the Temporal Judges follow his sentence in their Judgments, either for, or against the Inheritance that is in question.

Bracton. Special Bastardy, they say, is that, where the Matrimony is confessed, but the priority or posteriority of the Nativity of him whose birth is in question, is controversed; which to my thinking, if I conceive aright, is no other thing then the general Bastardy, transported in words, but agreeing in substance and matter with the other: for even these things which they pretend make special Bastardy, are parts and members of the general Bastardy, and are either confessed or enquired upon by vertue of the Kings writ in the same; For first for the Matrimony that is here mentioned, it is there agnised both by the Plantife in pleading of it, and the Defendant in the answering thereto, and therefore the Plantifes plea is thus; Thou art a Bastard, for that thou wast born before thy parents were lawfully contracted together in Marriage, or before their Marriage was solemnized in the face of the Church: To which the Defendants reply is, I am no Bastard, for that I was born in lawfull Matrimony, or that I was born after that my Father and Mother were lawfully married together: In both which you see, there is a Marriage confessed, and the question only is of the priority or posteriority of the nativity of him that is charged withall, whether it happened before, or after his parents

parents marriage, which, as they hold, is the other member of ſpecial Baſtardy: and yet this priority or poſteriority of nativity, by vertue of the Kings writ, comes no leſs in inquiry to the Ordinary in the caſe of the general Baſtardy, than they make it to be traverſable in the ſpecial Baſtardy; and therefore the writ to the Ordinary for general Baſtardy, is conceived in this manner: *viz. Inquiratis utrum prædictus A. pars rea, genitus vel natus fuit ante Matrimonium contractum inter talem Patrem ſuum, & talem Matrem ſuam; vel poſt.* So that either they muſt confeſs there is no ſuch Baſtardy, as they make ſhew there is, diverſe from that is tryed before the Eccleſiaſtical Judge, or that themſelves do confound the members that ſhould divide the ſame, and make them one, or the other, as them liſt; for both ſimply they cannot be, unleſs they be diſtinguiſhed with other notes and differences, than hitherto I find they are. But to ſay the truth, if theſe things be well weighed and conſidered, ſpecial Baſtardy is nothing elſe, but the definition of the general, and the general again is nothing but the definite of the ſpecial: for whoſoever is born out of, or before lawfull Matrimony, he is a Baſtard, and he again is a Baſtard that is born before, or out of lawfull Matrimony, ſo that theſe things to be a Baſtard, and to be born out of lawfull Matrimony are convertible one with the other: ſo then as it were very hard to make a divorce between theſe things that are ſo neer in nature one to the other, being convertible terms one to the other; ſo hard again it

Lib. Intrat. fol. 85. Glanvill lib. 7. cap. 15.

it were in policie to disjoyn these things in tryal, that are so neer in affinite one to the other, because they are the same, in substance, and nature as the other are, and therefore *Eodem jure censeri debent*; And also *ut continentia cognorum dividantur*, which is no less absurditie in Law, than it is a grossnes in other learning, to deny a principle, or generall Maxime of the profession.

12. q. c. 2. cognovimus

And so far hitherto as concerning the reasons and arguments, that may be brought against this special Bastardy. Now it resteth that I shew by ancient precedents that both these sorts of Bastardy have appertained to the Ecclesiastical Courts only, and the first precedent, is in the incident, the other in the principal: and the precedent is no less ancient then *Henry* the seconds time, as that which happened under *Alexander* the third, about the year of our Lord 1160. and the case is this.

Cap. Laso. ext. qui filii sunt legitimi.

A certain man of *Norwich* Dioces called *R. H.* had issue *I. H.* who had a Son called *C. H. I. H.* deceasing before *R. H.* the Father, *C. H.* succeeded in his Grandfathers Inheritance, his said Grandfather being dead; but *M. H.* Brother to the said Grandfather, pretending that the said *I. H.* was a Bastard, draweth the said *C. H.* into the Temporal Court upon the Inheritance; whereupon *C. H.* called the said *M. H.* into the Bishop of *Norwich* his Court, for the tryal of his nativity; but the Bishop long protracting the cause, *C. H.* appealed to the Pope, who delegated the same cause to the Bishop of *Excester*, and the Abbot of *Hereford*, with order, That

That if the said *W. H.* should not within two dayes this, prove that which he objected against *C. H.* that then they should intimate the same to the Secular Judge, before whom the inheritance was in question, that he should not stay any longer upon the question of legitimation, but proceed to Judgement in the cause of the inheritance. Which president, though it belong before the Statute of Bastardy, made by *Henry* the 6. and so no writ went from the Temporal Court, for the certificate thereof: yet it shewes, that the Temporal Judges in those daies did not proceed to Judgement in the principal cause, before the incident were decided by the Ordinary; and that they counted bastardy then to be of the Ecclesiastical cognisance; and that it was lawfull for him that was pretended to be a Bastard, to appeale from his Ordinary, if either the Ordinary detracted the determination thereof, or were suspected of partiality.

And thus far of the incident. There is another much like precedent to this in the same Kings daies, but that is in the principal, for that the inheritance came not first in question, but the legitimation it self, and the case is as followeth. A certain man called *Ralph*, kept one *Annline*, the wife of one *Allin*, by whom he was supposed to have begot one *Agatha*, who also being married, had a Son called *Richard*; *Ralph* going beyond the Sea, left *Richard* and his Mother *Agatha* in possession of all his goods and lands; but newes being after brought, that the said *Ralph* was dead beyond the Sea, *Francis* the Brother of the said *Ralph*,

Cap. Causam. ext. qui filii sunt legitimi.

Ralph, ſpoyled the ſaid *Richard* of the poſſeſſion of all the goods and lands he had of the ſaid *Ralph* his Grandfather, for that he did pretend the ſaid *Agatha* his Niece, and Mother of the ſaid *Richard* was not born of lawfull Matrimony, ſo that neither ſhe her ſelfe, nor her ſon ought to ſucceed the Brother of the ſaid *Francis*, but that the inheritance thereof did belong unto himſelf: whereupon the ſaid *Richard* being thus ſpoyled by *Francis* his great Uncle, obtained Letters of reſtitution to the Biſhop of *London*, the Biſhop of *Worceſter*, and the Biſhop of *Exceſter*, under this form; That before they entred into the principal cauſe, which was this, Whether the ſaid *Agatha* were born in lawfull Matrimony, or not, they ſhould reſtore the ſaid *Richard* to his Grandfathers inheritance. But the Biſhop of *Rome*, after underſtanding by the ſaid Delegates, that the plea of inheritance within this Realm, did not belong unto the Church, but unto the King, recall'd that part of his reſcript, which concerned the reſtitution of the ſaid *Richard* to his inheritance, and gave order to the foreſaid Biſhops, to proceed in the cauſe of legitimation; willing them to inquire, whether the ſaid *Agatha* were born of the ſaid *Aneline* in the life time of her husband *Allin*, and when ſhe dwelt and cohabited with him, as with her husband; or whether the ſaid *Ralph*, Father of the ſaid *Agatha*, kept the ſaid *Aneline* openly and publickly, while the ſaid *Allin* yet lived; And if they found it to be ſo, then they ſhould pronounce her the ſaid *Agatha* to be a Baſtard, for that *Aneline* her Mother could

could not be counted to be a wife but a whore, which defiling her husbands bed, presumed so keep company with another, her husband yet being alive: But if they found it otherwise then they should pronounce her, the said *Agatha* to be legitimate. All which was done after the death of the said *Ralph* and *Anselm*, as the Decretal it self shewes: Neither was there any authority that opposed it self against that proceeding, but held it to be good and lawfull, though it were in term of special bastardy, for then that which they now call special bastardy, was not born. Besides hereby it appeareth, that the Ordinaries then did not only proceed in cases of bastardy incidently, that is, when a suit was before begun in the Common Law, upon a tryal of inheritance, and that by writ from the Temporal Courts, but even originally, and that to prepare way unto inheritance, or any other good that was like to accrue unto a man by succession, or to avoid any inconvenience that might keep him from promotion, as may appear by this practise following.

Constitut. Otho innotuit de uxeratis & beneficiis amovendis.

Priests in the beginning of the Reign of *Henry* the 3. yet Married secretly, and their children were counted capable of all inheritance, and other benefits that might grow unto them by lawfull Marriage, so that they were able to prove that their parents were lawfully Married together by witnesses, or instruments: which many children did, either upon hope of some preferment, that by succession or otherwise was like to come unto them, or to a void some inconvenience that otherwise

wise might light upon them for the want of that proofe, some their Parents yet living, others their parents being dead, and the proceedings before the Ordinary was holden good, to all intents and purposes, even in the Common Law, for otherwise they would not have so frequented it: for as yet there was made no positive Law against marriages of Priests, and Ministers, but the Church of Rome then plotting against it, (for that by that they pretended the cure of Soules was neglected, and the substance of the Church wasted and dissipated) did by *Otho* then Legate *a Latere* to *Gregory* the ninth order by a Constitution, that all such Ministers as were married, should be expelled from their Benefices, and their Wives and Children should be excluded from all such livelihood, as the Fathers had got during the time of the Marriage, either by themselves, or by any middle person, and that the same should become due unto the Church wherein they did reside, and that their children from that time forth should be disabled to enjoy holy orders, unlesse they were otherwise favourably dispensed withall: which Constitution although it wrought to that effect, to barr Priests for that time of their Marriage, until the light of the Gospell burst out, and shewed that that doctrine was erronious, yet to all other effects, the proceeding in the case of Bastardie stood good as a thing due to be done by holy Church. And therefore *Lyndwood* comming long after, in his Catalogue that he maketh of Ecclesiasticall causes, reciteth Legitimation for one among the rest, for

that

that in those daies there was noe dispute or practise to the contrary.

And thus far as concerning those things wherein the Ecclesiasticall Laws are hindered by the Temporall in their proceedings contrary to Law, Statute and Custome anciently observed, which was the third part of my generall division Now it followeth that I shew wherein the Ecclesiasticall Law may be relieved, and so both the Laws know their own bounds, and not one to over-beare the other as they doe at this day, to the great vexation of the Subject, and the intolerable confusion of them both; which is the last part of this Treatise.

PART. IV.

PART. IV.

CAP. I.

SECT. I.

The means how to relieve the Civile Law: that they are of two sorts: that two things are required to the first means, and that the former of these is the right interpretation of Laws, and what that is.

The means therefore to relieve the poſſeſſion of the Civile Law are two. The firſt is, by the reſtoring of thoſe things which have been powerfully by the Common-Law taken from them, and the bringing of them back again unto their old and wonted courſe: The other is by allowing them the practiſe of ſuch things as are grievances in the Common-wealth, and fit to be reformed by ſome Court, but yet are by no home-Law provided for.

The firſt of theſe ſtands in two things, whereof the one is the right interpretation of the Laws, Statutes, and Cuſtomes which are written, and deviſed in the behalfe of the Eccleſiaſtical Law. The other conſiſteth in the correcting and ſupplying of ſuch Laws and Statutes that are either ſuperfluous or defective in the penning, made in the behalf

half (as it is pretended) of the Eccleſiaſtical profeſſion, but yet by reaſon of the unperfect penning thereof, are conſtrued for the moſt part againſt them.

The right interpretation of the Law, Statutes, and Cuſtomes pertaining to the practiſe, ſtandeth as is pretended in the Judges mouth, who notwithſtanding hath that authority from the Soveraign, and that not to Judge according as him beſt liketh, but according as the right of the cauſe doth require.

The ſupply or reforming that which is overplus, or defective, is in the Parliament, ſo notwithſtanding as that the Prince evermore breatheth life into that which is done.

Laws, Statutes, or Cuſtomes, are then beſt interpreted when as the very plain and natural ſenſe of them is ſought after, and no forrain or ſtrained expoſition is mixt with them; for that turneth juſtice into Worm-wood, and Judgment into Gall: then that the Judge be not too ſubtil in his interpretation, but follow ſuch expoſition of the Laws, as men of former age have uſed to make, if they be not plainly abſurd, and erroneous, for oft ſhifting of Interpretations breedeth great variance in mens ſtates, among ſuch as have buſy heads, and much diſcrediteth the Law it ſelfe, as though there were no certainty in it: with which although the ſage Judges of our time cannot be charged, for ought that I know, yet (I cannot tell how) men much complain the Laws are far otherwiſe conſtrued in theſe daies, than they were in former

ages: which as it is an ordinary complaint in the Temporal Courts, so it is not without cause much lamented at the Spiritual Court, where the interpretation upon the three Statutes of Tythes made by King *Henry* the eight, and *Edward* his Son, among other inconstancies of other Laws, hath such great variety of sense and understanding in sundry points thereof, as that if the makers thereof were now alive, and the first expositors thereof sate in place of Judgment again (the Statutes being measured by the interpretation they now make of them) they would hardly acknowledge them either to be the Statutes that they then made, or the other did after expound, and declare: for every of these Statutes, and the sense that was given of them, was wholly for the benefit of the Church, according to the tenor thereof, but as they now receive explication, they are not only not beneficial unto the Church, but the greatest hinderance to the same that may be; for the words are made to jarr with the sense, and the sense with the words, neither is there kept any right analogy in them, and therefore the Reverend Judges are to be intreated (because they challenge unto themselves the opening of the Statutes alone, albeit peradventure that be yet *sub judice*, where the Statute of Ecclesiastical causes is to be interpreted) that they would recall such exorbitant interpretations, as have of late gone abroad upon these Statutes, and restore them to their ancient sense and understanding. No man can so cunningly cloake an interpretation, but another will be as cunning as he

to

to ſpie it out, and then the diſcredit will be the Laws. *A ſmall errour* (ſaith *Ariſtotle*) *in the beginning, is a great one in the end, and he that goeth out of the way a little, the longer he goeth on, the farther he is off from the place his voyage was to.* and therefore the ſpeedier return into the way again is beſt. The old Proverb is: *He that goeth plainly goeth ſurely*, which may be beſt verifyed in the expoſition of the Law, if any where elſe; for commonly men offend no where more dangerouſly than under the authority of the Law, and therefore one ſaith very well, *that there are two ſalts required in a Judge, the one of knowledge, whereby he may have ſkill to Judge uprightly; the other of conſcience, whereby he may be willing to Judge according to that as his ſkill leadeth him unto*: both which being in the grave Judges, it is not to be doubted, but they will be eaſily induced to review their own, and their predeceſſors interpretations, and reduce ſuch exorbitant expoſitions as have ſcaped out thereof unto the right and natural ſenſe thereof: which if perhaps they ſhall be loath to do, for becauſe it makes for them, or for ſome other like partial reſpect, then humble ſupplication is to be made unto his Majeſty, that he himſelf will be pleaſed to give the right ſenſe of thoſe things which are in controverſy between both the Juriſdictions: for his Majeſty by communicating his authority to his Judge to expound his Laws, doth not thereby abdicate the ſame from himſelf, but that he may aſſume it again unto him, when, and as often as he pleaſeth. Whoſe interpretation

Lib. 5. Politic.

in that, is to be preferred before theirs, first for that his interpretation is impartial, as he that will not weaken his left side to make strong his right, (for so are these jurisdictions as they are referred unto his politique body) but will afford them equal grace, and favour, that he may have like use of them both, either in forraign or domestical businesse, as occasion shall serve: then that his Judges interpretation maketh right only to them between whom the cause is, but his highnes exposition is a Law unto all, from which it is not lawfull for any Subject to recede, neither is it reverseable by any, but by himself, upon a second cogitation; or him that hath like authority as himself hath: and therefore most fit to be interposed between Jurisdiction and Jurisdiction, that the one party be not Judge against the other in his own cause, which is both absurd and dangerous.

L. 2. num. 8. C. de legibus. L. 3. num. 7. C. eod. l. omnes populi ff. de justit. & jure.

And let this suffice for the right interpretation of Laws and Statutes: Now it followeth that I speak something of the supplies that may be made to the defects that are in the same.

CAP. I. SECT. II.

The second thing required to the first correcting of superstition, and supplying of defective Statutes.

IT is not to be doubted, but it was the full mind and intens of the Lawmakers, which made those three Statutes to infeoffe the Ecclesiastical Courts in the inheritance of all those causes that

are

are compriſed in thoſe Statutes, ſave thoſe that are by ſpecial name exempted, and that they did by the ſaid Statute, as it were deliver unto them full and quiet poſſeſſion of the ſame, for even ſo ſundry branches of the ſaid Statute do ſhew, as I have elſewhere made it manifeſt; and that there hath grown queſtion upon many points thereof, and that the profeſſors of the Eccleſiaſtical Law have been interrupted in the quiet poſſeſſion thereof, commeth of the unperfect penning of the ſame, and not of any juſt title or claim that may be made by the profeſſors of the other Law thereunto: but this is a thing not only proper to theſe three Statutes, but alſo common to all other Statutes which are writ of any Eccleſiaſtical cauſes within this Land; which notwithſtanding may be remedied, if it ſeem good unto his ſacred Majeſty and the reſt of the wiſdome of the Land aſſembled together at any time for the making of wholſome Laws, and the reforming of the ſame, by ſupply of a few words in ſome places, or periods that are defective, and yet keeping the true meaning and ſenſe of the ſame.

As for example in the Statute of the two and thirtieth of *Henry* the eight, in the 6. whereof, neer the beginning of the ſame Statute, the Statute ordering, that all perſons of this Realm, and other of the Kings Dominions ſhall truly, and effectually ſet out, and pay all and ſingular Tythes, according to the lawfull cuſtomes, and uſages of the Pariſhes where they grow, and become due: becauſe there is a queſtion made, where theſe

cuſtomes and uſages ſhall be tryed, in the Eccleſiaſtical or Temporal Law, if theſe or the like words had been added to the ſame (to be proved before an Eccleſiaſtical Judge after the form of the Eccleſiaſtical Law, and not elſewhere) the whole matter had been clear for that point.

And whereas again in the end of the ſame Statute, there be ſome good words tending to the appropriating of theſe matters of Tythes, and obligations, and other Eccleſiaſtical duties to the Eccleſiaſtical Courts; and that the remedy for them ſhall be had in the Spiritual Court according to the ordinance of the firſt part of that Act, and not otherwiſe: yet becauſe there is no penalty to that Act, baſe men eaſily make a breach thereinto, for that Laws without penalties, for the moſt part are weake and of no force: if therefore this or the like ſupply were made (if any man ſue for theſe, or like duties in any other Court, than in the Kings Eccleſiaſtical Court, the parties ſo ſuing, to forfeit the treble value of that which he ſued for, to be recovered in the Kings Eccleſiaſtical Court, where it ought to have bin commenced, by the way of Libel, or Articles, the one halfe thereof ſhall be to the King, the other to the party grieved) many of theſe ſuits would eaſily be met withall. Neither is it to the purpoſe that this is matter of money, and Lay-Fee that ſhould be in this ſort forfeited, and therefore is not Regularly to be ſued for in the Eccleſiaſtical Court; for ſeeing the cauſe is Eccleſiaſtical, upon which the matter of forfeiture ariſeth, it may be very well allowed, *Ne continentia cauſarum*

pauſarum dividantur: and for that ordinarily every juriſdiction that is wronged may defend it ſelfe with a penalty: beſide, we do by the like right in the Eccleſiaſtical Courts recover expenſes of ſuits in Law, fees of Advocates, and Proctors, and mony for redemption of ſin, ſo that it will be no ſtrange matter to have this kind of ſuit allowed unto the Eccleſiaſtical Court.

Further, whereas there are in the Statute of *Edward* the ſixt, chapter 13. in the beginning almoſt of the ſaid Statute two clauſes under pain of forfeiture, one of treble value, for Tythes carried away before they were divided, ſet out, or agreed for: The other of double value where the Tythes were hurt or impaired by the party ſtopping or letting him that had intereſt thereunto to carry them away, or by withdrawing, or carrying them away himſelf; and the ſame is ordered by a clauſe in the ſecond branch thereof reaching unto them both (for that a clauſe put in the end of two ſentences, ſtretcheth it ſelfe indifferently unto them both, if there be no more reaſon it ſhould belong to the one than the other, as there is not in this caſe, for if it were not ſo, the firſt penalty had no order ſet down, how it might be recovered) that the ſame ſhall be recovered according to the Kings Eccleſiaſtical Law: to which if there were added this word [only] and not elſe where, or otherwiſe, and they marſhalled in their right places, there were nothing more ſure or ſtrong.

Moreover, whereas in the firſt proviſo of that ſtature it is decreed, that none ſhall be compelled

to pay any manner of Tythes for any Heredita-
ments, which by the Laws or Statutes of the
Realm, or by any Priviledge, Preſcription, or
Compoſition Real, are not chargeable therewith
all; whereby it is doubtfull in what Court the ſaid
Exemptions are to be alleaged: if there were in-
ſerted theſe words, or other of like nature [the ſaid
Laws, Statutes, Priviledges, Preſcriptions, or
Compoſitions real to be alledged, argued, traver-
ed and determined before the Eccleſiaſtical Judge
only according to the form of the Eccleſiaſtical
Laws, and not elſe-where] upon like forfeiture of
treble dammages, as is aforeſaid, would make this
poynt ſure unto the Eccleſiaſtical Law.

Over and beſides this, whereas in the ſame
Statute there is a diſcharge allowed to barren
heath, and waſt ground, in ſome for not payment
of Tythes, in other for the manner of payment of
them for the ſpace of 7. years, after the improv-
ing and converting of them into arable ground
or meadow: it would make the matter plain
which Law ſhould have the pronouncing there
upon, if there were added theſe or the like words
[So the ſame ground be proved in form of Law
in the Eccleſiaſtical Court, to be barren, heath
and waſte.]

Laſtly, whereas in the ſaid Statute among other
limitations of cauſes, wherein the Eccleſiaſtical
Judge is not to deal by vertue of the ſaid Statute,
there is one in theſe words, neer the end of the
ſaid Statute [Ne in any matter whereof the King's
Court of right ought to have Juriſdiction] which

limit

limitation is so wide and large, that thereof there may be forged as many divers kinds of Prohibitions, as the Poets fained *Vulcan* ever made thunderbolts for *Jupiter*; And therefore it were very well and consonant to the good meaning of the said Statute, that this vagenes were restrained and reduced to more certainty of matter, by these or like words, [By any ancient Law or Statute of this Land.]

And so far as concerning the imperfection of the said three Statutes, and how they may be amended and made reducible to the first meaning and intent of the makers thereof, by some small supply, alteration, or change of words, the sense and ground-worke standing ever the same, according to the wisdome of his Majesty, and his great Councel assembled in Parliament.

CHAP. II.

SECT. I.

The second Meanes to relieve the Civile Law, which is, by altering it the practice of such things as are grievances in the Common-wealth, and fit to be reformed by some Court, but yet are not otherwise provided for: And first of the grievances which concern Parents and Children, and how they may be relieved.

NOw it followeth, that I shew wherein the practise of the Ecclesiastical Law (under which

which I comprise the Civile Law, so far as it is in use amongst us) may be increased to the benefit of the Subject, and the enlargement of the profession, without the prejudice of the Common-Law. And that I may first begin with the piety of Fathers towards their Children and Children towards their Parents, which is the beginning of all Common-wealths; for even Nature it selfe hath taught that, not only in the most brutish people that be, but also seeled it in the savagest kind of beasts that are upon the earth; the one to cherish that which it selfe hath brought out, and the other to love again that which hath brought it out: and yet, what Law is here in *England*, which provideth for the one or the other, unless it be the Statute of the xliij. of *Elizabeth*, and that is but for poor folkes children only (where otherwise they should be a burthen to the parish) but for the Parents themselves, or other Children that are cast off, either by the negligence, or the unnaturalness of the one toward the other, there is no provision at all. Yet by the Civile Law there is a purveiance made, whereby both the Father is compelled to acknowledge his Child, (if there be any variance between the husband and the wife upon any jealousie or suspicion of Adulterie, if the same cannot be proved by the womans own confession, by witnesses, by the Act it selfe, or some other violent presumption) and to nourish and maintain the same; but if the fault appear against her, and it be so sentenced by the Judge, then may he as well refuse the one as the other: but for other

ff. de agnoscend. & alendis liberis vel parentib. c. de alendis liberis vel parentib.

ff. de ventre inspiciendo, custodiendoq; partu. ff. de officio consulis, l. nequicquam §. de plane.

Children

Children upon whom there is no ſuch doubt, the Parents may be conſtrained to maintain, clothe, and feed them, and to ſet them out a portion of their goods, ſo that either the State and faculty of the Parents will bear it, or the Children have not deſerved to the contrary, wherefore they ſhould not in that ſort be provided for. And as the Father in this ſort is bound unto the Child; ſo the Child again is obliged unto his Parents, to provide for their ſuſtenance, ſo far forth as their ability will reach unto: for it is very unnatural, that the Parents ſhould want, ſo long as the Children have means to releeve them. In both which caſes, if either the Parents refuſe to admit of their Children, or the Children again refuſe to yeild comfort unto their Parents, the Judge may interpoſe his authority, and injoyn each to maintain other according to their ability, and as to his diſcretion ſhall ſeem meet, which if any of them ſhould deny to yeild unto, the Judge may, by Diſtreſs of their goods taken and ſold to the value thereof compell them to perform his order: and yet that only in caſe of Maintenance, and not to diſcharge debts, wherein either of them ſtand bound unto their creditors.

A man here in *England* dying, and leaving his wife Executrix, ſhe after marrying, carrieth away all his State unto her ſecond husband, who gives and ſpends thereof as him liſteth, without any regard of the Children of the firſt husband, (by whom all, or moſt of thoſe goods came) inſomuch, as many times thoſe Children when they come to

age,

age, and are to goe abroad into the world, they have nothing to begin the world withall, whereby many of them come to Beggery, and others to more fearful ends (for Necessity, as the Proverb hath is a hard weapon) neither is there any means in this common-wealth to relieve this mischief, for ought I can learn: but by the Civile Law there is a very good remedy; for by that Law, neither the woman surviving her husband, neither the man surviving his wife, having issue between them during the Matrimony, have the property of those goods, which either of them brought one to the other, and are left behind by the defunct; but the property is the Childrens of the deceased, and the use or benefit his or hers only which doth survive, during his or her natural life: which course if it were taken here in *England*, many poor Fatherless and Motherless Children would be in better state than they are: for then howsoever their present estate were hard, yet their future would be better, they should be secured to enjoy their Fathers or Mothers right: neither could such men or women which marry, or are married with persons of this sort, much complain if this Law were established here, for so should they have, though not a perpetuity in another mans state, yet a long and benefical fruition thereof, even so long as the party, in whom they were interessed did live: but for the return thereof unto the right owners, the Law is so scrupulous, that if the husband or wife do marry, it will have him that is to marry the widow, bound with good sureties for due restitu-

C. De secundis nuptiis tot tit.

tion

tion of the defunct's part, unto the Children of the former marriage.

CHAP. II. SECT. II.

The Grievances which arise by Executors, and how they may be relieved.

ANother inconvenience there is in Executors in this land, Cosen German to the former, which goeth altogether uncontrouled, whereby I ghess there is no *Law* in this *Land* to correct it: and that is, the trifling of Executors in paying of *Legacies* and bequests, under pretence of debts unknown, which they make shew they must provide for, upon danger of their own indemnity; whereby many *Legacies* are never paid, but stand, as it were, suspended until the day of doom. Against this abuse, the Civile *Law* hath two remedies: One by exacting bond of the Executor, that he shall pay the *Legacies* without fraud or deceit, according to the will of the defunct; the other, that if he refuse so to do, then the Judge may put the party complaynant in the possession of that which is demanded: for it is not enough for the Heire or Executor to pretend a debt, to the end that he may stay the *Legacy*, the Testator hath given in his hand, but he must make plain and manifest unto the Judge, that there is such a debt owing, and that the suit thereupon is either already begun, or very like to be begun in very short time, without fraud or collusion, otherwise many of those pre-

L. 1. §. 1. 2. & 3. ff. ut Legatorum nomine caveatur.

L. hæc autem ff. si cui plus quam per Legem falcidiam. ff. de regulis juris L. vanitimoris.

pretences and threats may be vain and elusory. And in case there be any such just cause of fear indeed, or there be any such suit in truth commenced upon the same, the Executor may secure himself by bond or suerty from the Legatory, that in case the debt be evicted of him, he shall repay to the Executor what he hath received: wherein, although it may be said, it is safer for the Executor to secure himself by keeping the Legacy still in his hand, than to trust upon suerty or other caution, for that these provisions many times are frail; yet since this kind of dealing is injurious to the Legatory, and the with-holding thereof, for the most part, hath no honest defence, but is grounded upon deceit and covetousness, it were behooveful for the common-wealth, that such ill dealing were redressed; for so mens Wills, which are their last Ordinances, (than the which, Princes have granted no greater benefit to men, than that in their life time they may dispose how their goods shall be bestowed after their death) shall have that end that the Testators themselves intended: which if they had known in their life time, their Executors would not have performed, they would never have put them in trust as they did. Besides, hereby the names of Executors which now are charged with manifold imputations, by the ill dealing of some, shall by this means be unburdened and restored unto their former credit, which was, to discharge the trust that by the defunct was reposed upon them; for the Will of the defunct cannot be defrauded without great sin.

L. Nisi si dolo §. si Legatarius ff. si cui plus quam per legem falcidiam licuerit.

ff. Si quis omissa causa testamen. l. nam facit totum. l. 4. ff. de hæredib. instituend. l. paterfamiliæ. §. 3.

An

An other miſchief there is in Executors and Adminiſtrators; not only uncontroulable by the Law of this Land, but rather allowed and juſtified by it; and that is, when they have once got the authority into their hands, and priced all at the loweſt rate, they will ſell away all at the higheſt price they can, and anſwer the poor Children, and Legatories, for whoſe good they were appointed Executors, at the value in the Inventary only, contrary to all right and reaſon: for by the Law, an Executor is to ſell nothing of thoſe things which are left unto the Children, or Legatories, but ſuch things only, which by keeping cannot be kept, or which being kept, will be chargeable to the inheritance: or otherwiſe the Teſtator were ſo indebted, that his ſtate muſt needs be ſold, for the ſatisfying of the Creditors: or laſtly, that he himſelfe ordered by his Will ſomthing ſhould be ſold. But for ſuch things as may be kept, and by keeping, will not be the worſe, he ought preciſely to preſerve them, ſpecially where the Teſtator hath bequeathed any thing in kind. And if he ſell ought of thoſe things he ought not to ſell, he may not ſell it but by the decree of the Judge, interpoſed upon the ſame, and upon juſt cauſe proved before him: wherein if it appear after, the Judge was abuſed, by any falſe allegation and corrupt teſtimony, the ſale is void, and the Minor, when he comes to his full age, or within 5. years after, may reverſe and recover that which is thus ſold by colluſion, out of the hands of him, to whom it

ff. de reb. eorum qui ſub tutela ſiunt ſine decreto non alienandis, vel obligandis, tot. tit. & ibi Bartol. in rubrica.

it was sold, as being done against the authority of the Law. And that it may be better understood, how precise the Law is in this point, and what things it alloweth may be sold without the decree of the Judge: and what not: I will set down the words of the Law it self, speaking of Tutors and Governors of Pupils; whose place Executors and Administrators do supply, so far forth, as they have the tuition and Governance of Minors, during their under-age, faithfully translated. And it is a Law of *Constantius* the great, reproving a former law of *Severus* the Emperour which gave leave to Tutors and Curators to sell away all the gold, silver, precious stone, appatel, & other rich moveables the Testator had, and to bring the same into mony, which turned greatly to the hinderance of many Orphans: whereupon *Constantine*, after he had first ordered, that nothing should be sold of the pearl, precious stone, naperie, utensels of the house and other necessary stuff and ornaments of the same, saith thus. Neither shall it be lawful for them, (meaning the Tutors or Creators) to sell the house wherein the Father dyed, and the Child grew up, wherein it is woe enough to the Child not to see his Ancestors images not fastned up, or else pull'd down. Therefore let the house, and all other his moveable goods still remain in the Patrimony of the Child, neither let any edifices or buildings, which came in good reparation with the inheritance, ruine or decay by collusion of the Tutor: but rather if the Father, or he whosoever the minor was heire unto, left any building in decay,

C. de administratorum, vel curatorum, extraordinaria lex qua.

cay, let the Tutor both by the Testimony of the work it self, and the faith of many, be compelled to repair it: for so the yearly rent will bring in more profit to the Minor, than the price of the things being deceitfully sold under-foot, will doe the Minor any good. Neither doth this Law only make provision against Tutors, but also against immodest and intemperate women, which many times engage unto their new married husbands, not only their own state, but even the state and lives of their Children. Farther, it crosseth the course of putting the Childrens mony to Usury (notwithstanding anciently it was thought, therein consisted all the strength of the Patrimony) for that course is seldom long, scarcely continual and stable, and that thereby many times the mony being lost, the Childrens state comes to nothing: and therefore his conclusion is, The Tutor should sell nothing without the order of the Judge, saving the Testators over-worn Apparrel, or those things, which by keeping could not be kept from corruption, and such Cattel as were superfluous. Whereby it appeareth, how careful that age was, not to give way to Executors by sale of the Testators goods, to make gain of the Orphans: neither is this age better than that; but that which was feared then, may be provided for now, by like authority as was then.

In this Land a man dying, leaving Legacies to his Children, and his Wife Executrix, or dying Intestate, and she taking Administration, and in her second marriage bringing all the first husbands

state, and her Childrens portions unto her second husband, and then dying, there is no remedy against the second Husband, to recover the said Legacies or portions due unto the Children out of his hands, because he is neither Executor nor Administrator, and that he came not to those goods by wrong, but by the delivery of the Executrix, with whom he married: but yet by the Civile Law there is, and that by this claim, that the said goods came unto his hand, and that it is no reason, any should be made rich by my goods against my will: for Legataries have no action against any, as Administrators in their own wrong, or hinderers of the performance of the last Will of the deceased, but Executors only, and they then alone, when the party having it, holds it by wrong, and not by lawful delivery, which in this case is otherwise.

L. si & me ff. de rebus creditis si certum petatur.

By the Law of this Land, there is no provision to preserve the state of a Prodigal person from spoyle, which neither hath regard of time, nor end of spending, unless the Father provide for this mischief in his Will, or by some other good order in his life, but he is suffered to waste and spend his goods until there be nothing left (as though the Prince and Common-wealth had no interest in such a Subject, to see he did not waste his estate, and abuse his goods) whereby many great houses are overthrown; and many Children whom the Fathers carefully provided for, never leaving raking and scraping all their life time, that their Children after them might live in great plenty and abundance,

nice, come to great ſhame and beggery. But the Civile Law hath remedy for it: For the Law counting ſuch a man that is in this ſort impotent in his deeds, howſoever he be otherwiſe ſenſible in his words, to be half mad, and to be a young man in his manners, how old ſoever otherwiſe he be in his years, ſets a Curator over them for the preſerving and well ordering of their ſtate no otherwiſe than if they were Children, or mad men indeed, who ſo long have power over them, and their goods, until they come to ſane manners, to which if they once return the Curators office ceaſeth.

ff. de curatorib. furioſo, & aliis extra minores damnis.

The like they do to a widow or ſole woman which liveth riotouſly, having neither regard of her fame, nor ſtate.

L. & mulieri ff. eod.

I find an old practice anciently uſed in the Eccleſiaſtical Courts, for reſtraining Executors or Adminiſtrators for dealing covenouſly in an Executorſhip or Adminiſtratorſhip, when there are more Executors named in a Will, than one, or more Adminiſtrators deputed by the Ordinary in an Adminiſtration than one, which were well if it were recalled, and brought back to his former uſe again. For now, as things ſtand many times one capricious fellow named an Executor in a Will, or appointed Adminiſtrator by the Ordinary with ſome other well-meaning men, getting a ſtart in this buſineſs of the reſt, ingroſſeth all into his own hands, and without privitie, or concurrence of the other, ſelleth, releaſeth, and diſpoſeth all at his own pleaſure, contrary to the minde either of the Teſtator, or the Ordinary who would not

have named so many in the Will, or Administration, but to the intent that all might or should execute and Administer, and one communicate their acts with another. The contrary whereof is many times very prejudicial and hurtful, to those that are to take benefit by the said Will or Administration, who for the want of the due performance of this kind of proceeding, are defrauded of all that which in right or reason should have come unto them, either by the Testators good will, or by the benefit of the Law. And yet there is no remedie for this in Law, so far as I know, for that all these making but one person in Law, the law yields no Action to the one to sue the other: but yet the ancient practice of the Ecclesiastical law hath remedie, which would redress all this mischief, if it were called again to use, and might go without controlment, as the equity of the cause doth require. And the remedie is this, That such other of the Executors or Administrators as are in this sort interverted from the execution of the Will, or Administration by the subtilty of any like Executor or Administrator, should crave the assistance of the Judge, and will him by vertue of his office to call in such practick Executor or Administrator, & to command him under pain of Excommunication, he proceed no further in the sole execution thereof, but communicate all his acts, and dealings with the rest of his Co-executors or Co-administrators: which if it were so ordered, would make many mens Wills and Administrations better performed than they are, and a great sort of poor Orphans states more

sure

ſure and certain, than commonly they are in ſuch Executors or Adminiſtrators hands.

And certainly in this caſe, there is ſome good uſe of Supervisors in dead mens Wills (whom many men meerly jeſt at, calling them candle-holders, as though they could do nothing elſe in the execution thereof, but hold the candle while the Executors tell the defuncts mony) if they might be permitted to put in practice that authority which the Law giveth them, and that is when they find any Executor deal fraudulently in the execution of any Teſtators Will, wherein they are named ſupervisors, or do ingroſs all the ſtate of the Defunct into his hands, as hath been before ſaid, they call him to a particular account, that it may be ſeen how the Adminiſtration ſtands, and each Executor may communicate to other particular receipts and diſburſments: which if any ſhall refuſe to do, then may the Supervisor make thereof complaint unto the Judge, as though the ſame man dealt not truly in the execution thereof, who though perhaps in the beginning could not take bond of him, for the true execution of the Will (becauſe the Teſtator had made choice of him, and therein approved his faith, and that no man required caution of him for any Legacie in the Will bequeathed, in which caſe the Judge might take bond of him for ſecuritie of ſuch Legacies as are bequeathed in the Will, yea though his faith hath been approved by the Ordinary, as hath been before remembred) yet may the Judge in this caſe, if he find him juſtly ſuſpected of fraud and deceit, re-

ff. De adminiſtratione tutorum. l. 3. §. 1.

move

Inſtit. de ſuſpectis tutorib. vel curator. toto tit.

move him by the learning of that Law. For neither the Teſtator himſelf, if he were alive again would indure him in this caſe, but would blot his name out of his Will, neither ought the Judge to ſuffer him, whoſe care is to ſee that dead mens Wills take their effect, according to the Teſtators meaning. All which the Law hath proviſion for, and for infinite things elſe of like good order in theſe caſes, if they might be ſuffered to put them in execution without impeachment.

And ſo far as concerning thoſe things wherein the Civile, and Eccleſiaſtical Law might be relieved, without prejudice to the Common Law, for becauſe they have no practiſe thereof: and yet do not I bring forth theſe as the only cauſes wherein the Civile and Eccleſiaſtical Law may be licenced to deal in, over and beſides the practiſe of thoſe things that they have already, but that theſe are few among many other which might be ſorted out, if ſo be there were any hope for the further enlargement of the profeſſion.

CAP. III.

Of the neceſſity of retaining the practiſe of the Civile and Eccleſiaſtical Law in this Land.

BUt now to the neceſſity of the maintenance of the Civile and Eccleſiaſtical Law in this Realm, as they are now practiſed, or ought to be practiſed, which was a thing firſt propounded, but laſt put in execution in this work.

Albeit

Albeit that which hath been already said as concerning the Civile and Ecclesiastical Law may well imply the necessary preservation of them both within this Land, yet because it was a thing I promised to shew in the beginning of this Treatise, after that I had gone over the rest of the parts of my division, I will in a word or two make plain the necessity thereof.

And therefore for a ground of all the rest, I will assume this for a matter confessed, that every man knows, that every well ordered Common-wealth stands on two parts principally, the politick part, which consisteth of the Prince and people, and the Ecclesiastical part which standeth in *Sacris & Sacerdotibus*. And therefore well said the Emperour, Two of the greatest things that God ever gave unto the world (meaning earthly things) was the Empire or secular government whereby the outward man is ordered and made, as *Aristotle* saith, *bonus civis*, that is a good and loyal subject: and the Priesthood whereby the inward man is ruled, and is made, as the said Author testifieth, *bonus vir*, that is a good and vertuous man, which are two wonderfull effects of the whole government in general; neither can the one of these be wanting, but the other will be ruinated and brought to desolation.

In authent. quon. oport. Episcopos in prin. col. 1 Authen. de non alienand & c. rebus Eccl. c. 2. §. 1.

Secondly, no man is ignorant of this, but in politique government two things sway the whole state, the one is peace at home, and the other is warre abroad: which as they have, their seasons; so they have their causes and effects, the one from

counsel at home, the other from discipline abroad; neither can the one, or the other of these be maintained, but by their private and proper Laws.

Beside, in peace who seeth not, there is as much need of vent by sea, for to benefit the Commonwealth by, either by importation of those things that we want at home, or by exportation of those things we abound with; as there is provision to be made for the increasing and preserving of those things that we have rising and growing by Land in our own Country, neither of which can be had or injoyed without their proper Laws fit and appertaining to either policy? And what Law is there that ordereth these businesses but the Civile Law only, which giveth a form to Navigation, and all occurrents that happen by sea, whether they be in, or about the Navigation it selfe or the contracts, or as it were contracts that are made in, upon, or beyond the same.

As a Legal form is requisite in peace at home, and Marine affairs abroad, that every thing may have his due effect according to the right thereof, so also it is necessary in warlike exploits upon the Sea, that every action have his limits and bounds, whereby Justice may be ministred: which if it be to be observed where lawfull warre is held between Prince and Prince, that every one be not left unto his own lust, much more is it expedient to be put in ure in Piracies and other Sea-robberies, where the innocent is spoyled, and the spoyler is enriched. The redress whereof is not, but by the Admiral Law, to whom the Princes of this Land have granted that authority. For

For the often commerce of Princes with Princes, and the negotiation that one State hath with an other, there is nothing more neceſſary, than frequent Embaſſages, whereby intelligence may be had what danger one State intendeth to another, and how the ſame may be prevented by Leagues or otherwiſe, and how the ſame may be made and maintaind: I know not what Law ſerves better for all theſe ends and purpoſes than the Civile Law.

In matters that appertain to the Souls health, the Preacher teacheth out of the word of God, wherein the right ſervice of God ſtandeth, he miniſtreth the Sacrament unto the people, and inſtructeth them in other fundamental points of Religion. But it is the Eccleſiaſtical Law that compelleth men to the due obſervance hereof, and puniſheth the trangreſſors.

All men grant, that there is a proviſion to be made for the Miniſter, for that it is againſt reaſon that any man ſhould goe to warfare on his own charges: but it is the Law of the Church that ſets out this proviſion, and yeildeth remedy for the recovery thereof, if it be denied.

Nothing is more due unto the dead, than that their laſt Wills ſhould be obſerved; for that it is ſuch an ordinance as man hath not in his power again, when God hath once called him hence, neither is there any thing that Princes have more gratiouſly granted unto their ſubjects, than that in their life-time they may diſpoſe of that which after they are dead, is none of theirs; and yet ſhall take place when they are not, as though yet they were

were theirs: in which provision the Civile and the Ecclesiastical Law, are above all other Laws most religious.

Christening, Wedding, Burying, whereby a man entreth into this world, converseth in the world, and returneth again unto the earth, from whence he was taken, and so after passeth to glory, and everlasting bliss, are every one of the Ecclesiastical cognisance.

How many men of great skill, such as few Princes have greater in all kind of learning, are of this rank, not only in the society of them that profess this knowledge here in the chiefest City of the Land, but also in both the Universities, and in sundry other places of this Realm, not strangers, or forrainers, but home-born Subjects, of the same faith, of the same religion, of the same kindred, and family, of like alleagiance to the Prince, and service to the Common-wealth as other his good Subjects are, even those that oppugne this profession chiefly; whose practice, if it be overthrown, or provision lessened, not only those that are now present, and make profession of this knowledge shall begin to turn their Copy, but those that are futurely to come, will change, their profession, when they see there is no reward or estimation belonging thereto? for it is honour that nourisheth Arts, and no man will follow that profession that is out of count and credit; but every Father will say unto his Son in like sort as *Ovids* Father said to him, when he saw him addict and give himselfe wholly to Poetry, *Studium quid inutile tentas?* It was anci-

anciently ſaid of the profeſſion of theſe Lawes, *Dos Juſtiniano honores*; but now it is ſo far off from that, that it confers honours, as that it is almoſt a diſcredit, for any man to be a Civilian in this ſtate, and the profeſſion thereof doth ſcarce keep beggery from the gate.

As God doth diſpoſe his government by juſtice and mercy (whereof notwithſtanding mercy hath the ſupream place in the Lords Tabernacle, as that which was put above upon the Ark, wherein were the two Tables of ſtone, in which the Law was written, to which St. *James* alluding, ſaith, *That Mercy triumpheth over Judgment*) ſo the Princes of this land to the imitation of that heavenly repreſentation, have appointed two ſupream ſeats of government within this land, the one of juſtice, wherein nothing but the ſtrict letter of the Law is obſerved, the other of Mercy, wherein the rigour of the Law is tempered with the ſweetneſs of Equity, which is nothing elſe but Mercy qualifying the ſharpneſs of Juſtice: to either which Courts they have ſorted out men fit for their skill and education to manage the ſame; that is, to the ſeat of Juſtice, the profeſſors of the Law of this Land, who may be thought beſt to know the Juſtice of the ſame: but to the other they have aſſigned the Profeſſors of the Civile Law, for that a great ſort of the titles of that law, are Titles of Equity, as, whatſoever is *Jus prætorium*, or *Jus ædilitium*, with them is matter of Equity; ſo that they may ſeem beſt able for their skill in theſe Titles (of which no other land hath the like) to aſſiſt the Lord Chancellour in matters of Conſci-

Exod. 25.

James. 2.

ence,

ence. Who though he be a man, for the moſt part, choſen by the Prince himſelf, out of the reſt of the Sages of this land, for his ſpecial good parts of learning and integrity above the reſt (as now the honourable perſon is that occupieth that place, who is, as *Tullie* ſaid of that eloquent Orator *Marcus Craſſus, Non unus ex multis, ſed unus inter omnes propè ſingularis*) ſo that they might be thought for their great and eminent wiſdom in all things appertaining to their place, able to direct themſelves; yet becauſe it is, *Divinitatis potius quàm humanitatis, omnium rerum habere memoriam, & in nullo errare*, as one ſaith, It was providently done by Princes of former age, to joyn to theſe great perſonages, men furniſhed with knowledge in theſe caſes of conſcience; wherein if they ſhould at any time ſtick, they might be adviſed by them that are aſſeſſors with them, what they find in the Law proportionable to the caſe in hand, that thereto they might ſquare their decree, or order accordingly; whoſe variety in theſe caſes is ſuch, that hardly there can fall out any caſe in practice, but there will be ſome law, in that learning, conformable unto it: which opportunity of men furniſhed with this knowledge for that ſeat, his Majeſty ſhall want, unleſs the ſtudy of the Civil and Eccleſiaſtical Law be maintained, which alſo for the caſes of Equity and Conſcience therein, is called of the old writers, *Æquitas Canonica.*

And what reaſon gave occaſion to theſe precedent Princes to place men indowed with the skill of the Civil law, in the Court of Chancery, the

ſame

ſame alſo miniſtred unto them minds to commit unto the ſelf ſame men, the ordering of their Courts of Requeſts: for that therein, for the moſt part are handled poor miſerable perſons cauſes, as Widdows and Orphans, and other diſtreſſed people, whoſe caſes wholly rely on piety and conſcience, as a fit ſubject for that law to deal in, which alſo will take a maime, if the ſtudy of the Civil law be not upholden.

So then to deny a free courſe to the Civil and Eccleſiaſtical laws in this land, in ſuch things as appertain to their profeſſion, or to abbridge the maintenance thereof, is to ſpoyl his Majeſty of a part of his honour (whoſe glory it is to be furniſhed with all ſorts of profeſſions neceſſary for his State, and beneficial for his Subject) to weaken the State publick, and bereave it of grave and ſage men, to adviſe the State in matters of doubt and controverſy between Forrain Nations and themſelves, to diſarm the Church of her faithful friends and followers, and ſo to cut the ſinewes (as much as in them lieth) of Eccleſiaſtical diſcipline, and to expoſe her to the teeth of thoſe, who for theſe many years have ſought to devour her up; and ſo now would do it, if the mercyfull providence of God, and the gracious eye of the Prince did not watch over her.

And ſo far of the neceſſity of theſe two profeſſions, and generally of the uſe and diſuſe of the Civil and Eccleſiaſtical law in this land; and wherein it is overlaid by the Common law, and how it may be relieved, if it ſeem good unto his Majeſty, and the the wiſdom of this Realm. All which I have written

ten, not of any purpose to derogate from the credit of that Law under which I was born, and by which I hold that small maintenance I have: (for I reverence it as a necessary law for this State, and make such reckoning of every of the Professors in his place, as becometh me) but that it pitieth me, and not only me, but all those that tender good learning, and have no prejudicate mind toward the Common law, to see two such Noble Sciences as the Civil and Ecclesiastical law are, so to be disgraced, as that there is no more reckoning made of them or their professors, than if they were matters and men of no worth, and fit or apt for no service in the Common-wealth: and yet notwithstanding, the use of them is so necessary as that the Common-wealth cannot want the service of them in matter of great importance to the State, which (if the profession should come to a downfall, as it is like shortly to do, if it be no more cherished and made of than it is,) will be sooner seen by the want of them, than is now perceived by having of them; and then perhaps, will the State lament for the loss of so goodly a profession, when it will be hardly recovered again, as the Children of *Israel* did for the Tribe of *Benjamin*, when they had in one day slain well nigh the whole number of them.

FINIS.

AN

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